NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 002 - FOLDER 011 DC

Elena Kagan Law Review 4 [2]

FOIA Number: Kagan

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsels Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14685

FolderID:

Folder Title:
Elena Kagan Law Review 4 [2]

Stack:	Row:	Section:	Shelf:	Position:
V	13	2	10	3

n187 42 U.S.C. 2000bb (1994).

n188 See City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

A. Free Exercise of Religion

The word "for" in Section 116 of the Australian Constitution, which forbids the Commonwealth making any law "for establishing any religion . . . or for [*83] prohibiting the free exercise of any religion," n189 supports the High Court's focus on whether the purpose of government action was to prohibit free exercise. The First Amendment to the United States Constitution seems to forbid laws that have that effect, regardless of their purpose. n190 Nevertheless, decisions by the United States Supreme Court offer little more protection for religious exercise than those of the Australian High Court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n189 Austl. Const. ch. V, 116 (emphasis added).

n190 U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . . .") (emphasis added).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

1. The Cases

Early United States Supreme Court decisions interpreting the free exercise clause of the First Amendment insisted that religious belief did not excuse violations of the general criminal law. n191 Later decisions afforded religious belief protection from general laws. In 1963, the Supreme Court invalidated the denial of unemployment benefits to a person who was unavailable to work on Saturday because of her religious beliefs. In Sherbert v. Verner, n192 the Supreme Court said that the state needed to show a "compelling interest" to justify the application of the unemployment law to this situation. n193 The high point of the Court's solicitude for religious expression was Wisconsin v. Yoder, n194 where it held that Wisconsin could not require Amish children to attend school beyond the eighth grade. n195 The subsequent decisions of the Supreme Court outside the unemployment benefits context rejected free exercise claims on the grounds that the burden on religion was insufficient to trigger the test or that the test was met. n196

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n191 See, e.g., Reynolds v. United States, 98 U.S. 145, 166-67 (1878) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land . . . .").

n192 Sherbert v. Verner, 374 U.S. 398 (1963).

n193 Id. at 406.

n194 Wisconsin v. Yoder, 406 U.S. 205 (1972).

n195 Id. at 234.

n196 See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (stating that the United States government may permit timber harvesting and road construction through a portion of national forest traditionally used for religious purposes); Goldman v. Weinberger, 475 U.S. 503, 506-10 (1986) (holding that uniform military law may be applied to prohibit wearing of yarmulke in doors); United States v. Lee, 455 U.S. 252, 259-60 (1982) (ruling that an Amish employer is required to participate in the social security system).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Free exercise clause interpretation has now largely returned to its earliest form as a result of the 1990 decision Employment Division v. Smith. n197 In that case, Alfred Smith and Galen Black were fired from their jobs with a drug rehabilitation organization in Oregon because they had consumed peyote. n198 Smith and Black sued to obtain unemployment compensation, claiming that [*84] denial prohibited the free exercise of their religion, because peyote use was an essential sacrament of the Native American Church. n199 Given American concerns over drug use, it is not surprising that they lost. Justice Sandra Day O'Connor's concurring opinion stated that the state had a sufficiently compelling interest in drug law enforcement to prohibit drug use, even for religious purposes. n200 Justice O'Connor did not join the majority opinion, however, because they took a much more controversial route to the same result. n201 Justice Antonin Scalia's majority opinion suggested that neutral laws of general applicability were immune from a First Amendment challenge. n202 He compared the drug law to a general tax and stated, "[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." n203

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n197 Employment Div. v. Smith, 494 U.S. 872 (1990).

n198 Id. at 874.

n199 Id.

n200 Id. at 906.

n201 Id. at 891.

n202 Id. at 879. The content neutral law is, for these purposes, a law whose application does not turn on the religious or communicative aspect of the behavior. A law that forbids interference with the military may be of general application because most interference will result from actions that are not primarily the expression of the ideas such as destruction of an ammunition dump or of files and records. But, if the determination of the existence of a law violation requires the court to examine the content of the words-a speech against military operations to determine whether they violate the policy of the law-the law is not content neutral.

n203 Id. at 878. In Barnes v. Glen Theater, Inc., Justice Scalia explained his Smith opinion. Barnes v. Glen Theater, Inc., 501 U.S. 560, 579 (1991) (Scalia, J., concurring). He characterized Smith as holding "that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion." Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Despite Justice O'Connor's belief that neutral laws of general applicability have no "talismanic" immunity from scrutiny under the First Amendment, n204 the Court has continued to assert that "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." n205

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n204 Employment Div. v. Smith, 494 U.S. at 901 (O'Connor, J., concurring).

n205 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Thus, the United States Supreme Court, like the Australian High Court, focuses its inquiry on the objective of a law that affects the free exercise of religion. If the impact on free exercise is only incidental, the law will be upheld. But generally applicable drug laws may bar sacramental peyote use as effectively as a law that forbids only the religious use. The failure to consider the impact of the law, the importance of the government's interest and whether the law needs to apply to religious conduct to secure that interest, threatens to allow harm to religious expression without furthering the legitimate interests of the government.

[*85]

2. The Religious Freedom Restoration Act

Problems with immunizing generally applicable laws from First Amendment free exercise scrutiny spawned a political solution in the United States. Mainstream religions perceived Smith to be an attack on religious freedom and combined with new and splinter groups to lobby for legislative protection of their interests. n206 They believed that Smith devalued religious acts and threatened their own practices. n207 Prior decisions, which had protected pacifists that refused to make weapons and Sabbatarians that refused to work on Saturday, now appeared vulnerable. n208 Congress responded to these concerns with The Religious Freedom Restoration Act, n209 which attempted to restore the prior law by requiring a compelling interest to justify any substantial burden on religion imposed by the state. n210

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n206 Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 895-96 (1994).

n207 Id. at 897.

n208 See generally Thomas v. Review Bd., 450 U.S. 707 (1981) (stating that an individual was entitled to unemployment benefits when he quit for religious reasons after learning that the steel which he was engaged in producing was used for producing armaments); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that Sabbatarian was entitled to unemployment benefits when fired for refusing to work on Saturday).

n209 The Religious Freedom Restoration Act, 42 U.S.C. 2000bb (1994).

n210 Id. 2000bb(b)(1).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Recently, in City of Boerne v. Flores, n211 the Supreme Court invalidated the Act. n212 The majority held that Congress lacks power to affect the substance of a constitutional right, and that Congress went beyond what was appropriate as a remedy. n213 The three dissenters, Justices Sandra Day O'Connor, Stephen Breyer, and David Souter objected to the majority's failure to reconsider the correctness of Smith, and would have set the case for reargument. n214 Despite the decision in Boerne, the political response may some day inspire the Supreme Court to revise its judicial views on religion, recognizing that immunity from scrutiny is not a healthy response to any law affecting basic human rights. n215

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n211 City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

n212 Id. at 2172.

n213 Id.

n214 Id. at 2186 (Souter, J., dissenting).

n215 See David Bogen, Generally Applicable Laws and the First Amendment, 26 Sw. U. L. Rev. 201, 204 (1997).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. Establishment of Religion

Unlike Australia, the United States Supreme Court refused to limit its establishment clause analysis to the purpose of the action. In Everson v. Board of Education, n216 the Supreme Court initially wrote of the "wall between church and [*86] state." n217 In School District v. Schempp, n218 the Supreme Court said "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." n219 The Supreme Court has also expressed concerns with laws whose administration entangled the government with religion. In Lemon v. Kurtzman, n220 the Court announced a three-part test that required challenged legislation to: 1) have a secular legislative purpose; 2) have a principal or primary effect that neither advances nor inhibits religion; and 3) not foster an excessive government entanglement with religion. n221

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n216 Everson v. Board of Educ., 330 U.S. 1 (1947).

n217 Id. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)) (internal quotes omitted).

n218 School Dist. v. Schempp, 374 U.S. 203 (1963).

n219 Id. at 222.

n220 Lemon v. Kurtzman, 403 U.S. 602 (1971).

n221 Id. at 612-13.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

While "purpose" rears its head in Lemon, it is only a portion of that test. The primary effect of the law is a separate part of the test, and the law's effect, rather than purpose, is more likely to cause it to run afoul of the Establishment Clause. When construing a statute, a court often looks to the purpose of a law to determine what effect they should give it. n222 When determining whether the law's purpose is legitimate, the analysis is reversed;

the Court uses the law's effect to determine its purpose.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n222 Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rule or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 400 (1950).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The "purpose" of legislation is not the conflicting desires of those who voted for it, but instead the end which it serves. Under normal circumstances, the statute's objective is to achieve an effect. Laws, however, have multiple effects. "Purpose" analysis distinguishes among those effects to select some as objectives and others as incidental consequences. It is essentially a fictional notion derived from the possible aims of legislation, as determined by its likely effects and actual effects, and refined by consideration of the normal significance of those effects and alternative means to produce them. n223 Although the existence of a secular effect opens up the possibility of a secular purpose for a law, the primary or principal effect of a law is the best evidence of its purpose. To the extent that "purpose" contains a fictional intent notion, a court might find a secular purpose despite a primary religious effect, but the primary effect test prevents the court from resting on a fiction. At the same time, the Lemon test does not help much in the actual determination of purpose or in determining whether an effect is "principal or primary" or subsidiary and secondary. n224

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n223 The purpose of a statute will be one or more of its likely or actual effects. Effects that are normally undesirable, such as expense, will not usually be the law's objective. Similarly, beneficial effects may be excluded from the purpose where they could be achieved more easily by alternative means or they appear minor in comparison with other benefits of the law. Purpose is even more complex than this quick reference to important factors suggests and is the subject of rich literature. Id. at 400-01.

n224 Lemon v. Kurtzman, 403 U.S. at 612-13.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*87]

In Agostini v. Felton, n225 the Supreme Court reaffirmed the Lemon test while providing evidence of problems in its application. n226 The Supreme Court reversed a prior decision n227 and permitted New York to send public school teachers into parochial schools to provide remedial education. n228 Justice O'Connor's majority opinion said that while the Supreme Court's general principles had not changed, it had changed its understanding of the criteria used to assess whether aid to religion has an impermissible effect. n229 Justice O'Connor wrote that the Supreme Court no longer followed a presumption that placement of public employees in parochial schools inevitably leads to state-sponsored indoctrination or constitutes a symbolic union between

government and religion. n230 Justice O'Connor stated that the "entanglement" test from Lemon was simply an aspect of the inquiry into a statute's effect to advance or inhibit religion. n231 The key issue for the majority was whether the program had the effect of advancing religion, and they concluded that the program "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." n232

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n225 Agostini v. Felton, 117 S. Ct. 1997 (1997).

n226 Id. at 2016-19.

n227 Id. at 2019 (overruling Aguilar v. Felton, 437 U.S. 402 (1985)).

n228 Id. at 2018-19.

n229 Id. at 2010.

n230 Id.

n231 Id. at 2015.

n232 Id. at 2016.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Justice O'Connor also said that the program could not be reasonably viewed as an endorsement of religion. n233 The endorsement test permits the [*88] Supreme Court to say that it is applying essentially objective tests rather than seeking to divine "intent" or "purpose." Nevertheless, the primary objective of a government action that appears to endorse religion is likely to support that religion, and a government action whose objective is to support religion will appear to endorse it. Thus, under this test, the Supreme Court avoids the briar patch of governmental intent, while assuring that laws whose objective is to establish religion will fall.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n233 Id. The endorsement test identified by Justice O'Connor has received increasing support. See Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (holding that the Board could not prohibit a private group from placing a cross in a location used as a public forum). Justice O'Connor stated: [W]hen the reasonable observer would view a government practice as endorsing religion, I believe it is our duty to hold the practice invalid. . . . Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form. Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, . . . the Establishment Clause is violated. Id. at 2454 (O'Connor, J., concurring) (citations omitted). Justices Souter and Breyer joined O'Connor's opinion in Capital Square, and Justice Stevens seemed to adopt an endorsement test as well. Justice Stevens stated, "if a reasonable person could perceive a

government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display." Id. at 2466 (Stevens, J., dissenting). The Justices differed on whether the determination of endorsement should be governed by the standard of a reasonable observer with specific knowledge of the facts surrounding the action and community context or by a reasonable person who might have less knowledge of the facts.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Justice Souter dissented in Agostini on the grounds that the program directly subsidized religion and could reasonably be viewed as an endorsement. n234 Four justices agreed in the dissent that the program breached the principle that the state cannot provide direct and substantial aid to religious institutions even if the criteria for such aid is not religious. n235

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n234 Agostini v. Felton, 117 S. Ct. at 2019-22 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting).

n235 Id. at 2022-25 (Souter, J., joined by Breyer, Ginsburg, and Stevens, JJ., dissenting).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

While the generally applicable law is not exempt from establishment clause analysis, it will rarely fail under the current majority's test. Where the law does not distinguish religion from secular matters, it is unlikely the government will appear to be endorsing religion. The law is likely to have a secular purpose and affect religion only incidentally. Nevertheless, it remains theoretically possible for a litigant to persuade the Supreme Court that the generality of the law was a mask for supporting religion. The unmasking would demonstrate both religious purpose and endorsement.

C. Freedom of Speech

The question of justification for exempting generally applicable laws from First Amendment scrutiny may soon apply to controversies regarding the freedom of speech, as well as, the free exercise of religion. The law is currently in a state of confusion, but two cases suggest that free exercise analysis may soon be applied to free speech.

1. The Conflict in the Cases on Generally Applicable Laws]

In Barnes v. Glen Theatre, Inc., n236 Glen Theatre, the Kitty Kat Lounge, and dancers Darlene Miller and Gayle Sutro challenged a state law that forbade public nudity. n237 Chief Justice Rehnquist's plurality opinion began by stating that nude dancing was an expression protected by the constitutional guarantee of freedom of speech. n238 Eight of the Justices applied a four- part test to determine whether the state law was constitutional: 1) is the law within the constitutional power of government; 2) does the law further an important or substantial governmental interest; 3) is the governmental interest unrelated to the suppression of expression; and 4) is the incidental restriction on the alleged First Amendment [*89] freedoms no greater than what is essential to the furtherance of that interest. n239 The justices applying this level of scrutiny, which carefully analyzed the interests involved, split evenly on the outcome. Justice Scalia, who cast the deciding vote, argued that dancing was conduct, not speech, and that the appropriate inquiry was whether the suppression of the expressive aspect of that conduct was the object of the law. n240 In this respect, Justice Scalia applied Smith's principle that a neutral law of general applicability was constitutional. n241

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n236 Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

n237 Id. at 562-63.

n238 Id. at 565-66.

n239 Id. at 567 (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.). Justice Souter agreed in the four-part analysis. Id. at 582 (Souter, J., concurring). Justice White followed the same analysis. See id. at 590 (White, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

n240 Id. at 576-79 (Scalia, J., concurring).

n241 Id. at 577-78.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The test used by the eight Justices in Barnes may be equivalent to the "reasonably proportionate" standard evoked in Australian cases. n242 Justice Lewis Powell used the idea of proportionality in examining the constitutionality of regulating nonmisleading lawyer advertising. n243 "Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served." n244 Justice Scalia later cited Justice Powell's statement when Scalia argued that the requirement that a regulation not "burden substantially more speech than is necessary to further the government's legitimate interests" n245 did not require a showing that the law was the least restrictive alternative, but only that it was proportional:

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n242 See supra notes 157-71 and accompanying text.

n243 See In re R.M.J., 455 U.S. 191, 203-04 (1982) (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980)).

n244 Id. at 203.

n245 Board of Trustees v. Fox, 492 U.S. 469, 478 (1989) (quoting from Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," . . . - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. n246

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n246 Id. at 480 (citations omitted).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In another recent case, Justice O'Connor said the requirement that laws regulating commercial speech can be no more extensive "than is necessary" to [*90] serve the governmental interest required that the law be proportionate. n247 "[T]here must be a fit between the legislature's goal and method, 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" n248

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n247 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1521 (1996) (quoting Board of Trustees v. Fox, 492 U.S. at 480.

n248 Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Justice O'Connor elaborated on the proportionality test used for commercial speech, stating that the fit between means and ends must be narrowly tailored and the scope of the restriction on speech must be reasonably targeted to address the harm intended to be regulated. n249 The regulation must carefully calculate the costs and benefits associated with the burden on speech imposed

by its prohibition; less burdensome alternatives to reach the stated goal indicate the fit between means and ends may be too imprecise. n250 If alternative channels permit communication of the restrictive speech, the regulation is more likely to be considered reasonable. n251

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n249 Id. (citing Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380- 81 (1995)).

n250 Id. (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

n251 Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Justice Scalia urged a very deferential view toward the application of the proportionality standard in a variety of contexts. Justice Scalia specifically pointed to the Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico n252 decision as an example of the relevant degree of deference. n253 The Supreme Court has since rejected Posadas in 44 Liquormart, Inc. v. Rhode Island, n254 requiring a closer look at the legislation and whether it is sufficiently narrowly tailored. n255

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n252 Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).

n253 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. at 1522.

n254 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

n255 Id. at 1510-14.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

It is not clear whether the Supreme Court will closely scrutinize and apply the concept of proportionality to generally applicable laws. Three days after its decision in Barnes, the Supreme Court decided Cohen v. Cowles Media Co., n256 saying that a generally applicable law does not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to get and report the news. n257 Instead of nude dancing, Cohen involved the publication of significant information about a political campaign. n258 After the Minneapolis Star agreed not to reveal his identity, Daniel Cohen, an employee of the Republican candidate for governor, gave the newspaper copies of public records that showed that the Democratic candidate for lieutenant governor had been charged with unlawful assembly and had been convicted of petty theft. n259 When the paper discovered that the unlawful assembly charges concerned a protest over failure to hire minorities, and that the theft was a failure to

pay for six dollars of [*91] sewing materials on leaving a store during a period when the candidate had been under a great emotional strain, the paper revealed that Cohen had given them the records. n260 Not surprisingly, this revelation embarrassed Cohen's employer and Cohen was subsequently fired. n261 Cohen responded by suing the Minneapolis Star. n262 The newspaper contended that its decision to identify Cohen was protected by the First Amendment. n263 The Supreme Court held that Cohen might pursue a promissory estoppel action, because promissory estoppel was a rule of general application and the application to speech here was not a product of governmental choice of forbidden speech, but a result of the defendant's own promise. n264

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n256 Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

n257 Id. at 669.

n258 Id. at 665-66.

n259 Id. at 665.

n260 Id. at 665-66.

n261 Id. at 666.

n262 Id. at 665.

n263 Id. at 668.

n264 Id. at 669-71.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Justice Anthony Kennedy later noted the conflicting rationales of Cohen and Barnes and stated that "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment." n265

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n265 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640 (1994). That same term Chief Justice Rehnquist's opinion in Madsen v. Women's Health Center reviewed an injunction against abortion pickets in which he stated: If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in Ward v. Rock Against Racism, and similar cases. Given that the forum around the clinic is a traditional public forum, we would determine whether the time, place and manner regulations were "narrowly tailored to serve a significant governmental interest." Madsen v. Women's Health Ctr, 114 S. Ct. 2516, 2524 (1994) (citations omitted). But this O'Brien-like standard is applied to regulations of the public forum, which is quite different than the statute that is not so confined.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

2. The Relationship of American Indecision to Australia

The freedom of political discussion implied from the principle of representative government found in the Australian Constitution is unlikely to apply to topless dancing in King's Cross, but it could well apply to a journalist's revelation of a source for information about a political candidate in an election. Chief Justice Mason cited Cohen in his opinion in ACTV, n266 noting that "in the United States, despite the First Amendment, the media is subject to laws of general application." n267

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n266 Australian Capital Television Pty. Ltd. v. Commonwealth (Austl. 1992) 177 C.L.R. 106, 143 (Mason, C.J.).

n267 Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Both Australian and American judges have distinguished between laws targeted at ideas and laws that are content-neutral in regulating the means of [*92] expression, noting that the former require a higher degree of justification than the latter. n268 American Courts have gone further with the suggestion in Cohen that the content- neutral law that is of general application requires no justification at all. n269 The only generally applicable laws challenged in Australia as violations of the implied freedom of political communication were upheld in opinions that found them appropriate and adapted to serve legitimate purposes, a test that was not thoroughly explored. n270 The High Court, therefore, remains free to decide what degree of scrutiny should be given neutral laws of general application for compatibility with the implied freedom of political discussion.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n268 See for example, the opinions of Justices Mason, McHugh, Deane, and Toohey in Nationwide News Pty. Ltd. v. Wills (Austl. 1992) 177 C.L.R. 1.

n269 Cohen v. Cowles Media Co., 501 U.S. at 669.

n270 See, e.g., Langer v. Commonwealth (Austl. 1997) 134 A.L.R. 400, 405- 06 (Brennan, C.J.).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

IV. Generally Applicable Laws

The neutral law of general applicability has two characteristics that make it arguably immune from First Amendment concerns. The first is that it affects primarily noncommunicative secular behavior. Such a law is normally justified by an interest unrelated to the suppression of communication or religion. In other words, it carries prima facie indicia of a legitimate government concern.

The second characteristic of the neutral law of general applicability follows from the first. Since the law's object is, on its face, unrelated to religion or expression, any impact on religion or communication appears to be incidental to another purpose.

A. The Case for Generally Applicable Laws

The contention that these characteristics of the neutral law of general applicability immunize it from scrutiny under the First Amendment depends on one of two propositions. Either the generality proves that the social interest the law serves outweighs the individual's interest in religion or expression, or freedom is defined in terms of governmental behavior rather than the impact on the individual.

Content-neutrality and general applicability do not indicate the importance of the underlying social interest justifying the law, which may be anything from protecting grass to preventing the collapse of western civilization (assuming those two are different). If all content-neutral laws of general applicability are consistent with the free exercise of religion and freedom of speech, the slightest social interest must outweigh the injury done to religious exercise or speech. That will be true only if the generality of the law assures that the injury to the exercise of religion or freedom of speech is slight. Although the affected individual would disagree, it can be argued that society's interest in free religious exercise or free expression is not significantly impaired by the generallaw. People are more likely to be hurt when someone is out to get them. Where only incidental impacts on religious exercise or expression are permitted, no one need [*93] fear that disagreement with their beliefs or views will result in laws against them. The particular law will not discourage speech or religious acts beyond its immediate application. The law does not affect the quality of free exercise of religion for society despite its impact on individual worshippers.

Alternatively, the free exercise of religion may be defined in terms of freedom from improper governmental action. If religious exercise is behavior impelled by religious belief, the free exercise of religion may be defined as the absence of restrictions based on disapproval of that belief. Disapproval or disagreement with the belief is not a legitimate basis for governmental

action. Under this definition of freedom, as long as the impact on religious exercise is purely incidental, there is no prohibition of free exercise.

This discussion suggests that the decision of the United States Supreme Court to exempt laws of general applicability from scrutiny is prompted by the same concern for the purpose of the law that marks the Australian High Court's approach in religion cases and is visible in its decisions on the implied freedom of political discussion.

There are two major arguments in favor of the view that laws of general application do not prohibit the free exercise of religion. First, that doctrine satisfies the demand for formal equality between believers and nonbelievers, the concern for governmental neutrality between differing views. Second, it creates an objective standard that avoids the appearance of political decisions.

Challenges to the impact of laws of general application on particular religious exercises usually call for an exemption from the operation of the law for the believer. Such an exemption raises issues of formal equality; if we seek religious neutrality, society should not prefer belief to disbelief and it should not privilege the believer to engage in conduct that the nonbeliever cannot pursue. The concern for neutrality is underscored by the constitutional prohibitions on establishing religion. While there are appropriate responses to this view, it remains a powerful ground to support the position of the Supreme Court.

Further, because no one suggests an absolute immunity for religious exercise, the alternative to exempting laws of general application is to balance the value of the religious exercise against the values served by the conflicting law. Such judicial weighing exposes the Justices to criticism for arbitrary and subjective decisions. Justices, as closely attuned definitionally as Justices Deane and Toohey, parted over migration agent registration in Cunliffe. n271 United States Supreme Court Justices disagreed on the strength of the respective interests in Smith. n272 Justice Scalia stated in Smith:

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n271 See Cunliffe v. Commonwealth (Austl. 1994) 182 C.L.R. 274.

n272 See Employment Div. v. Smith, 494 U.S. 872 (1990).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law [*94] unto itself or in which judges weigh the social importance of all laws against the

centrality of all religious beliefs. n273

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n273 Id. at 890.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. The Weaknesses of Immunity for Generally Applicable Laws

The "talismanic" immunity of the law of general application, however, does not comport with the reasons offered for it. The law may be prima facie legitimate, but a closer look can reveal that the law violates the premises of free exercise.

Once a doctrine of immunity is established, clever draftsman will invoke it. Even laws of general applicability are susceptible to pretextual use. If one seeks to injure the Native American church, a general proscription of the use of hallucinogens, including peyote, will do it. It may be using an awkward instrument to accomplish the goal, like draining the lake to catch a bass, but it will be used if the Supreme Court allows. The awkwardness of using laws of general applicability to accomplish a targeted result may justify a prima facie assumption that no improper purpose was involved, but it does not justify ignoring the possibility under any theory of freedom of religion.

The exemption for laws of general application, because their impact on religion is incidental, overlooks the potential of a segmented analysis. Even though the law was justified on a neutral basis, it could have provided an exemption for applications to religious exercise. The failure to provide an exemption may have been the product of antipathy to that religion. For example, the denial of unemployment payments to an individual that refuses work is a rule of general application, but pay is granted to some persons where the refusal to work is justified. The failure to acknowledge religion as a sufficient justification for refusal to work may flow from a disregard for the importance of religion to the individual. Allowing unemployment pay where religious principles cause the refusal to work has no significant effect on the unemployment compensation system's operation. Where the interest of the state in applying a general law to religion is a weak one, the possibility that the application is a result of forbidden purpose is strong.

Accepting the idea that the objective of the law is crucial to its constitutionality, no law should be immune from review for compatibility with the Constitution. General applicability alone does not negate the possibility

of an impermissible objective. The opinions of the Justices in the Australian freedom of political discussion cases have demonstrated the utility of a test of proportionality to assure that the impact of a law on speech (and religion) is entirely incidental and necessary to the accomplishment of a legitimate purpose. But proportionality alone will not resolve all questions, since the Court may differ on whether the law is proportional. Given the risk to fundamental values, the Court should scrutinize challenged laws with care rather than deferring to the surface plausibility of the state's asserted justification.

[*95]

V. Conclusion

The neutrality and general applicability of a law serves as an indicia that it is compatible with the free exercise of religion and freedom of speech, but it is not a guarantee of consistency even if those human rights are viewed in terms of the legitimate and illegitimate purposes of government. Unless we demand strong reasons for restrictions that apply to religion and speech, as well as to other matters, we may find our freedoms wane.

LEVEL 1 - 37 OF 96 ITEMS

Duke Law Journal

February, 1995

44 Duke L.J. 704

LENGTH: 22329 words

ARTICLE: RACIAL QUOTAS AND THE JURY

Albert W. Alschuler*

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* Wilson-Dickinson Professor, the University of Chicago Law School.

I gratefully acknowledge the research support of the Leonard Sorkin Faculty Fund and the Sonnenschein Fund, the outstanding research assistance of Scott Yut, and the helpful comments of Vikram David Amar, Penelope Bryan, Linda Chavez, Elena Kagan, Dan Kahan, Randall Kennedy, Nancy King, A.J. Kramer, Michael McConnell, Tracey Meares, Deborah Ramirez, Jeffrey Rosen, Stephen Schulhofer, and Richard Uviller.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

SUMMARY:
... Few statements are more likely to evoke disturbing images of American criminal justice than this one: "The defendant was tried by an all-white jury." ... The distinctive lack of harm of race-conscious jury selection methods becomes evident upon a review of the ways in which racial classifications can injure people. ... Again, however, a white person displaced from a grand jury in order to permit two minority group members to serve along with twenty-one members of the displaced juror's own race would be unlikely to conclude that his race had been branded inferior, that he had been judged not good enough to serve, or that he had personally been evaluated on the basis of crude group stereotypes. ... Ensuring the presence of minority-race jurors seems as likely or more likely to enhance the quality of grand juries' performance than other departures from random selection that the Supreme Court has upheld--for example, requirements that jurors be upright, intelligent, and well regarded in their communities. ... The Hennepin County proposal rests on only one group judgment--that the members of racial minorities are likely to have (or sometimes may have, or may reasonably be seen by the public as having) distinctive experiences and perspectives that can improve a grand jury's performance. ...

TEXT:
[*704]

I. Some History

Few statements are more likely to evoke disturbing images of American criminal justice than this one: "The defendant was tried by an all-white jury."

This statement might bring to mind the Scottsboro boys--uneducated African-American youths riding on a freight train through Jackson County, Alabama, in 1931; victors in a fight with white youths on the train; charged after their arrests with raping two white women; rushed to judgment before all-white juries; and sentenced to death. n1 The state's denial of effective counsel to these defendants led to the Supreme Court's decision in Powell v. Alabama, n2 in which the Court held for the first time that the Constitution affords a right to counsel in state capital proceedings. Following the ruling in Powell, following another Supreme Court decision three years later condemning racial discrimination in the selection of a Scottsboro defendant's jury on retrial, n3 and following a supposed rape victim's repudiation of her charges, further retrials before all-white juries produced new convictions. Pleas from Franklin and Eleanor Roosevelt for gubernatorial pardons proved unavailing. The last of the Scottsboro defendants to be released from prison was paroled in 1950. That same year, Alabama sought the extradition of another who had escaped to Michigan. n4

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The case of the youngest of the nine defendants, a 13-year-old, ended in a mistrial. Some jurors voted to accept the prosecutor's recommendation of a life sentence while others insisted upon the death penalty.

n2 287 U.S. 45 (1932).

n3 Norris v. Alabama, 294 U.S. 587, 596-99 (1935).

n4 See Dan T. Carter, Scottsboro: A Tragedy of the American South 412-13 (1969); James E. Goodman, Stories of Scottsboro 380-81 (1994).

Although the Scottsboro defendants escaped execution, the link between all-white juries and racial disparity in the imposition of capital punishment in the South has been incontestable. Between 1930 and 1977, of the 62 men whom Georgia executed for rape, all but four were African-Americans. See McCleskey v. Kemp, 481 U.S. 279, 332 (1987) (Brennan, J., dissenting) (citing Brief for Petitioner at 56, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*705]

One also might think of an earlier time than Scottsboro and of the Ku Klux Klan's epidemic of violence against African-Americans and white Republicans in the years following the Civil War. Senator John Sherman, a supporter of the Ku Klux Act of 1871, recited a series of atrocities in the South and noted that "from the beginning to the end in all this extent of territory no man has ever been convicted or punished for any of these offenses, not one." n5 One of several southern judges who offered evidentiary support for Sherman's allegations declared, "In nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors . . . ." n6

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 Cong. Globe, 42d Cong., 1st Sess. 157-58 (1871).

n6 Id. (quoting Judge Russel).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Sherman later supported the 1875 federal statute that outlawed racial discrimination in state jury selection. n7 Like other Republican leaders, he recognized that all-white juries would serve as instruments of oppression not only when African-American litigants came before them but also when white jurors closed their eyes to the use of terror and violence to enforce America's racial caste system. As an African-American commentator said in 1912, the problem is "not so much that the negro fails to get justice before the courts" as that "too often . . . the . . . white man . . . escapes it." n8 Gunnar Myrdal's landmark 1944 study of race in America declared, "It is notorious that practically never have white lynching mobs been brought to court in the South, even when the killers are known to all in the community and are mentioned by name in the local press." n9

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n7 Federal Civil Rights Act of 1875, ch. 114, section 4, 18 Stat. 335, 336-37 (codified as amended at 18 U.S.C. section 243 (1988)).

n8 Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the Nineteenth-Century American South 179 (1984) (quoting William H. Thomas, The Negro and Crime, Speech at the Southern Sociological Congress, Nashville (May 1912)).

n9 Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 552-53 (1944).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*706]

One's thoughts might turn to a time more recent than Scottsboro--the summer of 1955, when in Money, Mississippi, Emmett Till, a fourteen-year-old African-American visitor from Chicago, accepted a dare to speak to a white woman. n10 "Bye, Baby," he said. Several days later, Till's mangled body was discovered in the Tallahatchie River. Roy Bryant, the husband of the white woman, and J.W. Milam, the woman's brother, were charged with Till's murder. The principal evidence against them was the testimony of an African-American, Mose Wright. An all-white jury took slightly more than an hour to acquit the defendants. One juror explained, "If we hadn't stopped to drink pop, it wouldn't have taken that long." n11 Following the defendants' acquittal, they sold their story to a journalist for $ 4,000. Bryant and Milam said that they had meant merely to frighten Till but "had" to kill him when he refused to beg for mercy. n12 During the next decade, as large-scale civil rights activity came to the South, all-white juries failed to convict the defendants accused of killing Medgar Evers, Viola Liuzzo, and Lemuel Penn. n13

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n10 See Juan Williams, Eyes on the Prize: America's Civil Rights Years, 1954-1965, at 39-52 (1987).

n11 Stephen J. Whitfield, A Death in the Delta: The Story of Emmett Till 42 (1988).

n12 Williams, supra note 10, at 42.

n13 For an indication of the strength of the evidence in one of these cases, see Michal R. Belknap, The Legal Legacy of Lemuel Penn, 25 How. L.J. 467 (1982).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Talk of all-white juries might evoke a time still closer to the present. In Miami in 1980, four white police officers were tried on charges that they had beaten to death an African-American arrested for a traffic offense. The defendants' attorneys, acting together, struck every potential African-American juror, and the all-white jury that their challenges produced acquitted the officers. The Miami riots followed. Four years later, another Miami police officer was charged with manslaughter in the death of an AfricanAmerican suspect. Again, the defense attorney's strikes produced an all-white jury; again the defendant was acquitted; and again the acquittal sparked public outcry. n14

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n14 See William T. Pizzi, Batson v. Kentucky: Curing the Disease but Killing the Patient, 1987 Sup. Ct. Rev. 97, 153-54.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In thinking of race and juries, the events of April 29, 1992, are likely to be close to mind. On that date, a California jury with no African-American members failed to convict any of four Los
[*707] Angeles police officers of misconduct despite the fact that most of these officers had been videotaped kicking and beating Rodney King, an African-American suspect, as he lay on the ground. The jury's decision triggered the worst race riot in American history, n15 two days of violence that cost fifty-eight lives and nearly one billion dollars in property damage. n16

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n15 William Julius Wilson, Crisis and Challenge: Race and the New Urban Poverty, U. Chi. Rec., Dec. 8, 1994, at 2, 4.

n16 See Seth Mydans, Prosecutor Seeks Retrial of Officer in King Beating, N.Y. Times, May 14, 1992, at A20; Neal R. Peirce, Look Homeward, City of Angels, 24 Nat'l J. 1250 (1992). Mayor Tom Bradley of Los Angeles voiced the sentiment of many Americans when he said of the videotape, "We saw what we saw. What we saw was a crime." Bill Boyarsky, Ashes of a Mayor's Dream, L.A. Times, May 1, 1992, at B2. A federal court jury composed of nine whites, two African-Americans, and one Latino later convicted two of the officers involved in the beating of violating Rodney King's civil rights. See Jim Newton, Koon, Powell Get 2 1/2 Years in Prison, L.A. Times, Aug. 5, 1993, at A1; Jim Newton, Racially Mixed Jury Selected for King Trial, L.A. Times, Feb. 23, 1993, at A1.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Two conclusions about juries composed entirely of members of America's majority race seem almost too obvious to mention. First, in many communities, these juries are mistrusted; and second, the mistrust has deep historical roots. n17

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n17 This mistrust in fact extends to some juries not composed entirely of members of America's majority race. See infra note 117 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

II. The Hennepin County Quotas

A year before the 1992 Los Angeles riots, an all-white grand jury in Minneapolis, Minnesota, exonerated Dan May, a white police officer who had shot and killed Tycel Nelson, a seventeenyear-old African-American suspect. n18 The grand jury's no-bill of Officer May and the protests and tension that followed were among the circumstances that prompted a Hennepin County task force to recommend, n19 and the Minnesota Supreme Court to approve, n20 a plan for abolishing all-white grand juries in Hennepin County. Governments can reduce the likelihood of all-white juries in many ways, n21 but there is only one way to end them. The
[*708] Hennepin County Task Force proposed racial quotas. n22 Because the use of quotas in selecting petit jurors would not pose significantly different constitutional issues from those raised by their use to select grand jurors, the Hennepin County proposal offers a
[*709] useful vehicle for assessing the issues raised by affirmative action in the selection of both grand and petit jurors. n23

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n18 Jill Hodges, Officer Cleared in Shooting: Grand Jury Brings No Charges in Death of Tycel Nelson, Minneapolis Star Trib., Mar. 27, 1991, at A1.

n19 Hennepin County Attorney's Task Force on Racial Composition of the Grand Jury, Final Report 45 (1992) [hereinafter Hennepin County Final Report].

n20 See Maureen M. Smith, Pilot Plan to Assure That Each Grand Jury Has Two Minorities, Minneapolis Star Trib., Oct. 29, 1993, at B6. Prior to the supreme court's action, a majority of Hennepin County's 54 district judges had voted to support implementation of the Task Force proposal.

n21 For example, governments can use more inclusive jury source lists, eliminate or restrict peremptory challenges, increase jury size, reconfigure the geographic vicinages from which jurors are drawn, take steps to encourage or enforce compliance with jury summonses, make jury service more convenient or remunerative, require judges to take racial demography into account when ordering a change of venue, or "oversample" minorities in sending jury summonses and questionnaires. See Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. Rev. 707, 752-56, 771-72 (1993). In December 1993, the Hennepin County District

Court, following a recommendation of the Hennepin County Task Force, Hennepin County Final Report, supra note 19, at 58, began a day-care program for the children of grand and petit jurors. Smith, supra note 20.

n22 Hennepin County Final Report, supra note 19, at 45. The Task Force proposal remains unimplemented. Officials are following potentially relevant constitutional litigation in Georgia, seeking a formal amendment of the Minnesota Jury Management Rules, Minn. R. 628.41 (1992), and attempting to devise and to secure the approval of procedures for testing the proposal's constitutionality.

In Vasquez v. Hillery, 474 U.S. 254 (1986), the Supreme Court reaffirmed earlier rulings that racial discrimination in the selection of a grand jury cannot be harmless error. The habeas corpus petitioner in Vasquez had been indicted 23 years before his case came before the Supreme Court. He had been found guilty beyond a reasonable doubt by a properly constituted trial jury. The Court nevertheless set aside his conviction because the grand jury that indicted him had been selected in a discriminatory manner. Id. at 266. In light of Supreme Court decisions like Vasquez, a ruling forbidding on constitutional grounds the use of racial quotas in jury selection would jeopardize the conviction of any defendant indicted by a grand jury selected partly through the use of such a quota. Although Michael O. Freeman, the Hennepin County Attorney, supports the proposal of the Hennepin County Task Force, he is reluctant to implement it in all cases and thus run the risk that his office later would lose many convictions of fairly tried defendants. Freeman's office has considered whether the proposal might be implemented for just one grand jury--a grand jury that would hear less serious cases than those considered by other Hennepin County grand juries. Even if partial implementation of the proposal were feasible, however, customary plea-negotiation practices in minor felony cases might make the generation of a test case unlikely, see Tollett v. Henderson, 411 U.S. 258, 266 (1973) (holding that the entry of a competently counseled guilty plea bars challenge to the composition of a grand jury); and for the County Attorney to withhold an otherwise appropriate plea agreement simply to generate a test case would seem unfair. Perhaps, if a judge refused on constitutional grounds to impanel a grand jury chosen in accordance with the Task Force proposal, a mandamus action filed by the County Attorney against the judge would provide a suitable vehicle for testing the proposal's constitutionality.

The Justices who joined the majority opinions in Vasquez and like cases apparently considered the retrial of improperly indicted but fairly tried defendants an important symbol of America's commitment to overcoming its history of racism. These Justices probably did not realize that their rulings would greatly inhibit all forms of color-conscious affirmative action in jury selection. I am as convinced as I was 20 years ago that these decisions are unfortunate. See Albert W. Alschuler, The Supreme Court, the Defense Attorney, and the Guilty Plea, 47 U. Colo. L. Rev. 1, 29-30 (1975).

n23 The use of quotas to select petit juries would have been a more significant innovation in the criminal justice system. Grand juries no longer initiate most felony prosecutions; unlike most petit juries, they need not act by unanimous vote and typically may act by majority vote; their function is to determine the existence of probable cause rather than guilt beyond a reasonable doubt; they proceed without an adversary presentation of evidence; and they often seem dominated by the prosecutors who advise them. Marvin Frankel & Gary Naftalis, The Grand Jury: An Institution on Trial 16-24, 6771 (1977).

Perhaps the Hennepin County Task Force was asked to focus on grand rather than petit juries simply because all-white grand juries were a special source of controversy and concern. In addition, the fact that grand juries are substantially larger than petit juries might have made the grand jury seem a more appropriate body for the initiation of affirmative action measures.

In Hennepin County, in which 9% of the adult population are people of color, Hennepin County Final Report, supra note 19, at 27 (1990 census figures), the Task Force's proposal to include two "minority persons" on every 23-person grand jury, id. at 45, would not afford minority persons greater than proportional representation. The same statement could be made of a plan to include one minority person on every 6-person petit jury, but only if one were willing to "round up" a fraction not much greater than one-half. Treating adult population figures as the appropriate baseline, the expected number of minority persons on a 6-person Hennepin County petit jury is 0.54. See 51 Minn. Stat. Ann., Rule 802(i) (West 1993) (authorizing the use of six-person juries in misdemeanor prosecutions and in felony prosecutions with the defendant's consent). Even without rounding, proportional representation would yield one minority person on every 12person petit jury, but guaranteeing the presence of one minority juror could suggest "tokenism"--or, perhaps, ineffectiveness, if one feared that a single minority juror often would lack reinforcement in jury deliberations. See Harry Kalven, Jr. & Hans Zeisel, The American Jury 462-63 (University of Chicago Press 1971) (1966) (noting that 12-person juries with three or fewer first-ballot dissenters almost never hang); see also Reid Hastie et al., Inside the Jury 106-08 (1983) (finding that in a study of simulated 12-person juries, single holdout jurors abandoned their positions 75% of the time).

Extension of the Hennepin County Task Force proposal to petit juries would require judges to draw substitute jurors from a list of minority persons whenever either peremptory challenges or challenges for cause reduced the number of minority persons below the required minimum. A lawyer's knowledge that a challenged minority juror would be replaced by another would reduce the lawyer's incentive to engage in racial discrimination in jury selection and would have some bearing on whether the lawyer had engaged in discrimination in fact. Implementation of the proposal would not otherwise affect a court's administration of the requirements of Batson v. Kentucky, 476 U.S. 79 (1986), and Georgia v. McCollum, 112 S. Ct. 2348 (1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Most felony prosecutions in Hennepin County are commenced by information rather than by grand jury indictment, but all firstdegree murder cases must be submitted to a grand jury. n24 Although only 9% of the adults in Hennepin County are people of color, a majority of the homicide cases presented to the grand jury
[*710] involve people of color as victims, suspects, or both. Specifically, in cases presented to Hennepin County grand juries since the end of 1989, 66% of all victims and 71% of all suspects have been members of racial or ethnic minorities. n25

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n24 Minn. R. Crim. P. 8.01.

n25 Hennepin County Final Report, supra note 19, at 29.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The methods used to select grand jurors in Hennepin County are almost certainly constitutional, yet the proportion of minorities on Hennepin County grand juries in recent years has been 5.3%, substantially smaller than the proportion of racial minorities in the adult population. n26 Moreover, the county's grand jury selection methods yield all-white grand juries nearly 40% of the time. n27 A striking fact, then, is that although 71% of the suspects whose cases come before Hennepin County grand juries are people of color, 40% of these suspects' cases are heard by bodies of twentythree people that include no minority-group members.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n26 Id. at 27. Hennepin County selects its jurors from driver's license, state identification card, and voter registration lists. These lists apparently include more than 98% of the eligible adult population. Id. at 9, 38. Minority-group members, however, change their places of residence more frequently than whites. King, supra note 21, at 714. The lists from which jurors are selected include people who have recently left Hennepin County, omit people who have recently come into the county, and provide incorrect addresses for some people who have recently changed residences within the county. See Hennepin County Final Report, supra note 19, at 38 (suggesting updating voter registration lists every two years instead of every four years). Minority-group members not only are less likely than whites to receive jury summonses and questionnaires but also are less likely to return them. See King, supra note 21, at 714. The members of minority groups also may be more likely than whites to be excused from jury service on grounds of financial hardship, responsibility for the care of another, and the like. For some not very helpful data on these questions, see Hennepin County District Court, Excused Juror Study: November 1993; Hennepin County District Court, Excused Juror Study: June 1994 Update; Hennepin County District Court, Analysis of Hennepin County Jury Data: Further Explanation of Data Presented to the Conference of Chief Judges (1993).

n27 Specifically, 26 of 66 grand juries since 1968. Hennepin County Final Report, supra note 19, at 27.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Under the Task Force proposal, a questionnaire would ask prospective grand jurors whether they wished to identify themselves as "minority persons." n28 No one would probe the prospective jurors' responses or scrutinize their ancestry. Twenty-one of the grand jury's twenty-three members n29 would then be selected [*711] at random from a list of fifty-five people qualified to serve. n30 If the questionnaires of at least two of these twenty-one jurors revealed that they were "minority persons," the remaining grand jurors would be selected in the same way that the first twenty-one had been. If, however, no minority persons or only one were included in the initial group, officials would draw one or two grand jurors exclusively from respondents who had identified themselves as minority persons. If necessary, the officials could turn to a second list of fifty-five people or a third or a fourth to ensure the presence of at least two minority persons on every Hennepin County grand jury. n31 Apart from these officials, no one would know whether a grand jury had been selected at random

or partly through jurymandering. n32

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n28 See id. at 45.

n29 Minnesota, like most other states and the federal government, authorizes smaller grand juries, see Minn. R. Crim. P. 18.03; Minn. Stat. Ann. section 628.41(1) (1993), but Hennepin County adheres to the number 23--the number of grand jurors that English law required from the 14th century until England abolished use of the grand jury in 1933. See Jon Van Dyke, The Grand Jury: Representative or Elite?, 28 Hastings L.J. 37, 38-41 (1976).

n30 Hennepin County Final Report, supra note 19, at 45.

n31 Id.

n32 The term "jurymandering" is Jeff Rosen's. See Jeff Rosen, Jurymandering, New Republic, Nov. 30, 1992, at 15.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

III. Other Quotas

The Hennepin County proposal is one of a number of affirmative-action jury-selection measures currently under consideration or already in place in American jurisdictions. In Arizona, a bar committee has proposed dividing jury lists into subsets by race and drawing jurors from each subset. n33 Some Arizona judges currently strike trial juries that, in their view, do not include adequate numbers of minority jurors. n34 In DeKalb County, Georgia, jury commissioners divide jury lists into thirty-six demographic groups (for example, black females aged 35 to 44); they then use a computer to ensure the proportional representation of every group on every venire. n35

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n33 Jeff Barge, Reformers Target Jury Lists, A.B.A. J., Jan. 1995, at 26, 26.

n34 Id. (noting that in order to include some Hispanic-Americans on an AfricanAmerican defendant's jury, Judge B. Michael Dann once impaneled three successive juries). R. William Ide, then president of the American Bar Association, described in a recent ABA Journal column the proposals of an ABA task force to reduce racial and ethnic bias in the justice system. These proposals included "changing jury selection practices to ensure proportionate minority representation." R. William Ide III, Eradicating Bias in the Justice System, A.B.A. J., Mar. 1994, at 8.

n35 Andrew Kull, Racial Justice, New Republic, Nov. 30, 1992, at 17, 18.

A Florida statute requires that, upon a motion of any party, every judge who orders a change of venue "give priority to any county which closely resembles the demographic composition of the county wherein the original venue would lie." Fla. Stat. Ann. section 910.03(2) (West Supp. 1995).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*712]

The Federal Jury Selection and Service Act of 1968 n36 was designed to ensure a measure of racial balance in federal jury panels. The Act requires panels to be drawn from voter registration rolls or from lists of actual voters unless the use of these sources would lead to the substantial underrepresentation of a racial (or other) group. In that event, the Act orders courts to augment the voting rolls with other sources. n37

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n36 Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. sections 1861-1878 (1988)).

n37 See id. section 1863(b)(2); Foster v. Sparks, 506 F.2d 805 app. at 815-19 (5th Cir. 1975) (study by Judge Walter P. Gewin, An Analysis of Jury Selection Decisions).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For ten years, the U.S. District Court for the Eastern District of Michigan maintained a racially balanced jury wheel by sending extra jury questionnaires to areas in which African-Americans constituted 65% or more of the population. More recently, this court has sought demographic balance by removing from the jury wheel some questionnaires of whites. n38

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n38 See King, supra note 21, at 722-23.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Similar color-conscious jury selection methods are in use in other jurisdictions to "balance the box"--that is, to ensure racial proportionality in the initial pool from which petit and grand juries are drawn. n39 Seeking racial balance in the wheels and boxes from which petit and grand jurors are drawn appears to be less controversial than seeking racial balance in juries themselves. n40 The reason for creating racially balanced jury pools, however, is presumably to make racially balanced juries more likely. Although departures from the principle of color-blindness may be less visible when they occur early in the jury selection process, they do not seem significantly different in principle.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n39 Randall Kennedy, The Racial Rigging of Juries, Am. Experiment, Fall 1994, at 1; see King, supra note 21, at 719-26.

n40 See King, supra note.21, at 726.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

To be sure, the demographics of particular jurisdictions may make it easier to achieve racial balance in large groups than in small groups. For example, DeKalb County, Georgia, plainly could not include representatives of thirty-six demographic categories on a jury of only twelve people. After attaining a balance in a jury pool that would be unattainable in a jury, officials might reasonably leave to chance the extent to which particular groups were represented on juries. n41 In the absence of demographic con- [*713] straints, however, the use of quotas to select juries seems no more objectionable than the use of quotas to select jury pools. If, for example, a county's population were two-thirds white and onethird black, providing that only the initial pool need reflect this balance would seem a hesitant and ineffective way of making juries more representative. Exorcising the specter of the all-white jury altogether would appear more sensible. Nevertheless, for some observers, the use of quotas in jury selection apparently becomes less troublesome when there remains a sporting chance that these quotas will not achieve their objective. n42 These observers may share to some degree the posture of some opponents of affirmative action in jury selection--hoping for racial balance on juries, at least in some cases, but unwilling to act directly to bring it about. Somewhat like champions of the ordeal, these observers appear to trust the gods of Fate, Luck, and Statistics. n43

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n41 See infra Section VIII(B); see also Batson v. Kentucky, 476 U.S. 79, 86 n.6 (1986) ("It would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogenous nature of our society.").

n42 Color-conscious jury selection methods tend to be less visible at the early stages of the process partly because they are less effective. A jurisdiction like Hennepin County might send jury questionnaires to minority-group members at a higher rate than to whites (because minority-group members are less likely to receive and return them, supra note 26), and this measure might produce a pool of prospective jurors in which the proportion of minority jurors matched the proportion of minority-group members in the county's adult population--say, 10%. The random selection of 23 grand jurors from a large pool engineered to ensure 10% minority-group membership would yield all-white grand juries 9% of the time. Report by Steven D. Penrod to the County Attorney's Office, Hennepin County, Minnesota (1994) (on file with author).

n43 The phrase "Fate, Luck, and Statistics" is appropriated from Andrew G. Deiss, Negotiating Justice: The Criminal Jury Trial in a Pluralist America 23 (1995) (unpublished manuscript) (on file with author).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

IV. The Venerable Quota

The determination of jury membership by demographic quotas is not new. Before the end of the twelfth century, English charters promised Jews that disputes between Jews and English subjects would be resolved by juries composed half of Jews and half of Englishmen. n44 These charters originated the English jury de medietate linguae--a jury composed half of Englishmen and half of the countrymen of an alien party. n45 The use of mixed juries in cases

[*714] involving aliens remained a feature of English law for 700 years. n46

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n44 See Marianne Constable, The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge 4-5, 18, 96-97, 145 (1994).

n45 Following England's expulsion of the Jews in 1290, juries de medietate linguae were used primarily in cases involving alien merchants. See Lewis H. LaRue, A Jury of One's Peers, 33 Wash. & Lee L. Rev. 841, 848-50 (1976); Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of "de Medietate Linguae": A History of a Proposal for Change, 74 B.U. L. Rev. (forthcoming Nov. 1994); Daniel W. Van Ness, Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases, 28 J. Marshall L. Rev. 1, 35-37 (1994); see also Peter J. Nelligan & Harry V. Ball, Ethnic Juries in Hawaii: 1825-1850, 34 Soc. Process in Hawaii 113 (1992) (describing the use of mixed juries to resolve disputes between natives and foreigners in 19th-century Hawaii).

n46 Ramirez, supra note 45.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Members of the Plymouth Colony employed a similar procedure in 1674 when they added six Indians to a jury of twelve colonists to try three Indians for murder. n47 In 1823--in one of several recorded cases of early American jurymandering--Chief Justice John Marshall impaneled a jury de medietate linguae to try an alien charged with piracy and murder. n48

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n47 Id.

n48 United States v. Cartacho, 25 F. Cas. 312, 312-13 (D. Va. 1823) (No. 14,738).

The jury de medietate linguae may not seem closely analogous to the procedures proposed by the Hennepin County Task Force. The aliens who served on juries de medietate linguae were ineligible to serve on other juries, and the analogous treatment of the members of minority groups might disqualify them from serving on juries in cases involving white litigants while guaranteeing that they would constitute half of all jurors in cases involving minority litigants. This procedure would treat minority-race jurors, like the aliens who served on juries de medietate linguae, as less than full members of the community. The history of the jury de medietate linguae could be cited to support the claim that demographic jurymandering is permissible, but this history is consistent with the proposition that demographic distinctions among citizens are rarely appropriate.

England, however, did use mixed juries in some cases in which all of the parties were English. Burgesses sometimes obtained juries composed half of burgesses; disputes concerning church patronage were tried before juries composed half of clerics and half of laymen; and university scholars were tried for serious crimes by juries composed half of freeholders and half of matriculated laymen. James C. Oldham, The Origins of the Special Jury, 50 U.

Chi. L. Rev. 137, 168-69 (1983). Early in the 19th century, Jeremy Bentham recalled the "genius of some now forgotten statesman" who had invented the jury de medietate linguae and proposed the use of "half-and-half" juries composed of six gentlemen and six yeomen. See Jeremy Bentham, The Elements of the Art of Packing, As Applied to Special Juries, Particularly in Cases of Libel Law 222-26 (Garland Publishing 1978) (1821); Van Ness, supra note 45, at 32-35, 45.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Apparently no African-Americans served on juries in the United States before 1860. n49 When Reconstruction governments
[*715] ended the exclusion of African-Americans in the South, they sometimes mandated racial quotas as well. The first African-Americans selected for jury service in the South were the six impaneled along with six whites to try Jefferson Davis for treason. Although this racially balanced jury was discharged when the government elected not to prosecute, n50 in at least a few southern jurisdictions, judges and other officials ensured that the earliest integrated juries were composed half of blacks and half of whites. n51

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n49 The first African-Americans ever to serve on a jury in America were apparently two who sat in Worcester, Massachusetts, that year. Leon F. Litwack, North of Slavery: The Negro in the Free States, 1790-1860, at 94 (1961).

In 1718, however, the Attorney General of Maryland agreed that "negro Jem," charged with murder, should be tried by a jury de medietate linguae. William Kilty, Statutes Found Applicable 152 (1811) (citation supplied by Deborah Ramirez). It is uncertain whether Jem's race triggered the decision to grant his request for a mixed jury and whether his jury included African-Americans. My colleague Richard Ross suggests that racial attitudes in Maryland in the early 18th century make these possibilities unlikely and that "negro Jem" could well have been a subject of the Netherlands, France, or Spain.

n50 See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 106 (1994) (citing The First Integrated Jury Impaneled in the United States, May 1867, 33 Negro Hist. Bull. 134 (1933)).

n51 See Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 358 (1988); Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 50 n.234 (1990).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In South Carolina, where the state legislature required that grand and petit juries reflect the racial composition of the counties in which they sat, n52 an observer declared in 1869, "The sensation is peculiar . . . to see a Court in session, where former slaves sit side by side with their old owners on the jury, where white men are tried by a mixed jury, where colored lawyers plead, and where white and colored officers maintain order." n53 Statesmen of the generation that wrote and ratified the Fourteenth Amendment apparently did not consider racially balanced juries discriminatory. n54 Nevertheless, when a black defendant argued in 1879 that
[*716] the Constitution required his jury venire to be one-third black, the

Supreme Court unanimously rejected his contention. n55

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n52 Joel Williamson, After Slavery: The Negro in South Carolina During Reconstruction, 1861-1877, at 334 (1965).

n53 Id. at 329-30 (citing N.Y. Times, June 14, 1869, at 5).

n54 See Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754 (1985):

> Race conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

The Thirty-Ninth Congress submitted the Fourteenth Amendment to the states in its current form (with its guarantee that no state shall "deny to any person within its jurisdiction the equal protection of the laws") rather than in the language proposed by Thaddeus Stevens: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." Andrew Kull, The Color-Blind Constitution 67 (1992).

n55 Virginia v. Rives, 100 U.S. 313, 322-23 (1879):

> It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men.

Cf. Fay v. New York, 332 U.S. 261, 291 (1947) ("Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution.").

That a claim of constitutional entitlement to the use of racial quotas was seriously pressed in 1879 may indicate that the people who wrote and ratified the Fourteenth Amendment were far from endorsing an ideal of color-blindness. Indeed, a federal district judge, Alexander Rives, had accepted the defendant's claim. See Rives, 100 U.S. at 335 (Field, J., concurring). Judge Rives once observed that in his own court he had "always ordered mixed juries" and had "not discovered that harm has resulted from it . . . ." 7 Charles Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-1888 pt. 2, at 442 (1987) (quoting a statement reported in the Richmond Dispatch, Dec. 12, 1878).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Language in some of the Supreme Court's recent opinions--notably City of Richmond v. J.A. Croson Co. n56 and Shaw v. Reno n57 --indicates that the Court would depart from the probable "original intention" of Reconstruction statesmen and would subject Hennepin County-style affirmative action to strict scrutiny. Some academic commentators have suggested that the Hennepin County proposal is unconstitutional. n58 I believe, however, that a court attuned to the virtues of judicial restraint and local initiative ought to uphold the Hennepin County plan. In supporting this position, my goal will be not to repeat familiar arguments about affirmative action but to emphasize that affirmative action in the context of
[*717] jury selection presents a different issue from any that the Supreme Court has considered.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n56 488 U.S. 469, 486-93 (1989).

n57 113 S. Ct. 2816, 2824-25, 2829 (1993).

n58 See King, supra note 21, at 760-75 (approving of some color-conscious jury selection methods but apparently disapproving of Hennepin County-style quotas); Memorandum from Dan Farber to Carl Warren (Oct. 8, 1991), in Hennepin County Final Report, supra note 19, app. (doubting that the Hennepin County proposal could satisfy the standards of Croson but "personally finding the proposal quite reasonable"); Letter from Fred L. Morrison to Louis N. Smith 3 (Oct. 8, 1991), in Hennepin County Final Report, supra note 19, app. ("It would appear that the proposal would have to meet the 'strict scrutiny' test. None of the rationales put forward seems to reach this high level of necessity."). But see Letter from Shari Lynn Johnson to Michael O. Freeman 2 (Oct. 22, 1991), in Hennepin County Final Report, supra note 19, app. ("The strict scrutiny standard can be met."); Letter from Roy L. Brooks to Michael O. Freeman 3 (Oct. 21, 1991), in Hennepin County Final Report, supra note 19, app. ("The Task Force's proposal . . . should survive constitutional scrutiny under the Equal Protection Clause.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

V. Juries Are Different

The Supreme Court has recognized that the importance of representative juries justifies a departure from the standards employed in equal protection litigation to test assertedly discriminatory governmental action. The Court has held that in criminal cases the systematic exclusion of an identifiable group from jury venires violates a "fair cross-section requirement" implicit in the Sixth Amendment right to jury trial. In 1940, the Court wrote, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," n59 and in 1975 the Court declared, "The selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." n60 Although the fair cross-section requirement does not truly require that either juries or jury venires include a cross-section of the population (a result that would require the use of demographic quotas), n61

the Court's test of discrimination under the Sixth Amendment looks less to purpose and more to effect than does the test of discrimination that the Court employs in cases arising under the Equal Protection Clause. n62

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n59 Smith v. Texas, 311 U.S. 128, 130 (1940).

n60 Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

n61 In Taylor, 419 U.S. at 538, the Court declared that the fair cross-section requirement does not require "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Disregarding the fair cross-section requirement's grounding in the Sixth Amendment right to an impartial jury (and not to an impartial jury panel), the Court also has said that the requirement extends only to the panels from which juries are selected, not to the juries themselves. Lockhart v. McCree, 476 U.S. 162, 174 (1986). Even in the selection of jury panels, the Court has condemned only the "systematic" exclusion of distinctive groups. See id.; Duren v. Missouri, 439 U.S. 357, 364 (1979). "Systematic" exclusion probably does not encompass repeated "accidental" exclusion. See Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 185 n.127 (1989) ("Were the luck of the draw to yield a jury, a jury panel, or even five consecutive jury panels composed entirely of wealthy Republican women golfers, their selection probably would not violate the Constitution.").

n62 See Duren, 439 U.S. at 368 n.26 (noting that in equal protection cases, statistical disparity is evidence of discriminatory purpose that may be rebutted, but that "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement . . ."); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure section 21.2(c)-(d), at 835-38 (student ed. 1985); see also Casteneda v. Partida, 430 U.S. 482, 510 (1977) (Powell, J., dissenting) (suggesting that the fair cross-section requirement invalidates some practices not condemned by the Equal Protection Clause).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*718]

Juries are distinctive both because affirmative action in jury selection has special virtues and because it is likely to prove less costly to individuals and society than affirmative action in other contexts. Emphasizing the distinctive virtues, Vikram David Amar has noted the kinship between jury service and voting. He contends that color-conscious jury selection can extend participation in public affairs more widely and that race-conscious measures to promote civic participation are easier to square with the Constitution than other affirmative action measures. n63

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n63 See Vikram D. Amar, Jury Service as Political Participation Akin To Voting, 80 Cornell L. Rev. (forthcoming 1995) (noting also a work-in-progress by Amar and Alan Brownstein that will explore the issue in greater detail). Cf. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in

the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The distinctive lack of harm of race-conscious jury selection methods becomes evident upon a review of the ways in which racial classifications can injure people. A person challenging an affirmative action program typically has been denied a tangible benefit--a job, a promotion, a government contract, or admission to an educational program--largely on the basis of race. Jury service is in one sense a job, albeit a job that pays less than two dollars per hour, n64 and some jurors find their courtroom experience rewarding. Nevertheless, most prospective jurors attempt to avoid service, n65 and because jurors are selected mostly on the basis of chance, even prospective jurors who would prefer to serve have little personal expectation or claim to be chosen.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n64 See Minn. Stat. Ann. section 593.48 (West 1988) (authorizing the payment of $ 15 per day to jurors).

n65 See Stephen J. Adler, The Jury: Trial and Error in the American Courtroom 14 (1994). Most Americans who are sent jury summonses never appear at the courthouse because their summonses are not delivered, they ask to be and are excused, or they ignore the summonses. Two-thirds of the prospective jurors who do appear do not serve because they ask to be and are excused, lawyers challenge them, or they are never sent to a courtroom. See id. at 243 n.1.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Who might have served on Hennepin County grand juries in the absence of the county's efforts to achieve racial balance can never be known. Anyone on the list of qualified jurors might have been chosen if selection had proceeded at random. Even if some displaced majority-race juror could learn who he was, however, he
[*719] would be unlikely to conclude that the county's racial classification had denied him a significant tangible benefit. n66

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n66 Jury service differs in this respect even from the other major form of citizen participation in government, voting. Unlike a prospective juror, everyone qualified to vote has a right to vote (not just a right to be free of invidious or irrational discrimination in the selection of voters from a pool of prospects). Someone with a right to vote may have a sense of personal injury when geographic gerrymandering or other governmental action has deliberately given him less "voice" in the affairs of government than has been accorded others who differ from him in skin color. See Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."); see also Johnson v. Grandy, 114 S. Ct. 2647, 2663 (1994) (holding that preventing dilution of the votes of a racial minority does not demand dilution of the votes of the racial majority and that color-conscious geographic districting whose predictable effect is proportional representation does not offend the Voting

Rights Act).

Shaw v. Reno, 113 S. Ct. 2816, 2829-30 (1993), held that racial gerrymandering can violate the Constitution even when it produces no vote "dilution"; this gerrymandering can unconstitutionally segregate the voters of different races in different voting districts. The Hennepin County Task Force proposal, however, far from segregating the members of different races, would bring them together on grand juries.

A prospective white juror in Hennepin County could not reasonably claim denial of a voice in government to which she was personally entitled, but she might note some asymmetry in the treatment of her racial group. This juror might assert an attenuated (or "diluted") form of vote dilution. Under the Task Force proposal, whites would be limited, roughly, to proportional representation. Hennepin County Final Report, supra note 19, at 45-46. Hennepin County grand juries could never be much more than 90% white. But the luck of the draw might yield a grand jury of more than 10% "minority persons"--even, in truly flukish circumstances, 100%. In other words, although the Hennepin County quotas would never reduce the number of minority persons below the number that random selection would have yielded, they sometimes would reduce the number of whites below this level. This asymmetry might appear troublesome if one viewed random assignment as the relevant baseline, disregarding asymmetry in the distribution of racial and ethnic groups. Nevertheless, the danger that minorities would gain more power than whites under the Hennepin County proposal is insubstantial, and the lack of a more rigorous form of proportional representation is not the feature of the Hennepin County proposal that its critics are likely to find most objectionable. Cf. United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977) ("As long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on grounds of race.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Apart from any loss of tangible benefits, a racial classification can injure by stigmatizing, demeaning, or reinforcing group stereotypes. Again, however, a white person displaced from a grand jury in order to permit two minority group members to serve along with twenty-one members of the displaced juror's own race would be unlikely to conclude that his race had been branded inferior, that he had been judged not good enough to serve, or that he had
[*720] personally been evaluated on the basis of crude group stereotypes. n67

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n67 In this respect, the Hennepin County proposal does not differ from other affirmative action measures. These measures rarely, if ever, brand or stigmatize whites.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Affirmative action programs sometimes are thought to stigmatize, not members of the majority race, but the programs' intended beneficiaries. These programs may appear to give special consideration to people who would not have qualified for a benefit on the basis of merit alone. Jury selection rests less on merit than on chance, however, and a racial quota would merely supplement one mechanism for promoting community representation (random selection) with

another (deliberate racial balance). This sort of affirmative action would not imply that unqualified or marginally qualified people had been given a special boost.

Apart from any injury that affirmative action programs may inflict on displaced majority-group members or the programs' intended beneficiaries, these programs sometimes appear to divert governmental or private enterprises from their primary missions and to injure the public. As the potential patients of brain and heart surgeons, for example, we might well be concerned if we concluded that medical schools were admitting students who they doubted would be as successful surgeons as the ones they turned away. There is, however, no reason whatever to suppose that grand juries designed to include two minority-group members would accomplish their purposes less effectively than grand juries selected entirely at random. To the contrary, these grand juries probably would achieve their goals better. Ensuring the presence of minority-race jurors seems as likely or more likely to enhance the quality of grand juries' performance than other departures from random selection that the Supreme Court has upheld--for example, requirements that jurors be upright, intelligent, and well regarded in their communities. n68

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n68 E.g., Turner v. Fouche, 396 U.S. 346, 353-55 (1970) (upholding a Georgia statute giving commissioners discretion to eliminate anyone found not "upright" and "intelligent"); Carter v. Jury Comm'n, 396 U.S. 320, 331-37 (1970) (upholding an Alabama requirement that jurors be "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Grand and petit juries should to a considerable extent reflect the will of the community, and their judgments should command community respect. n69 By marshaling a substantial body of opinion
[*721] in support of their rulings, juries help to assure all members of the community that the awesome power to accuse and convict people of serious crimes is exercised in a legitimate way. The principal reasons for impaneling a reasonably large body of jurors are in fact to ensure a diversity of viewpoints, to increase the likelihood that the jury will represent all elements of the community, to promote group deliberation, and to enhance the public's acceptance of grand jury rulings. Ensuring some diversity of race and ethnicity is likely to promote all of these objectives as well.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n69 See infra text accompanying notes 132-37; cf. 2 James Wilson, The Subject Continued--of Juries, in The Works of James Wilson 503, 537 (Robert G. McCloskey ed., 1967) ("The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered.").

Efforts to determine what communities jurors represent sometimes have provoked intense dispute. The anti-Federalists who opposed ratification of the Constitution objected to the jury trial provision of Article III, Section 2, on the ground that it extended vicinage too broadly and so permitted defendants

to be tried by jurors who were not truly members of their own communities. The Sixth Amendment responded to the antiFederalists' objection by narrowing the vicinage of federal jury trials. See Francis H. Heller, The Sixth Amendment to the United States Constitution: A Study in Constitutional Development 25 (1951). Moreover, as scholars have emphasized in recent years, communities need not be defined solely in geographic terms. See, e.g., Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy (1994). Current affirmative action proposals are part of a continuing effort over the centuries to define and redefine the representative role of juries.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The proponents of affirmative action in jury selection sometimes have emphasized the appearance of justice as much as (or more than) the substance of justice. n70 The Supreme Court has said that the "need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes." n71

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n70 See, e.g., King, supra note 21, at 762 (declaring "(1) that maximizing the appearance of fairness of criminal jury proceedings is a compelling governmental interest, (2) that fair racial representation on juries is vital to the appearance of fairness in criminal jury proceedings, and (3) that in some circumstances race-conscious selection practices may improve, not impair, this appearance" (footnote omitted)).

n71 Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992) (footnote omitted).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Jeffrey Abramson has cautioned, however, against an overemphasis on appearances, cosmetics, and public relations: "This attempt to justify the cross-sectional ideal by reference to its contribution to the appearance rather than the actuality of justice is disturbing. It makes the purpose of the cross-sectional theory a
[*722] nakedly political one, bent on popularizing the verdict . . . ." n72 Even after the disturbances following the Rodney King verdict, it is more important that justice be done than that it be seen to be done. n73 Nevertheless, public confidence in the legal system remains (other things equal) preferable to the alternative. That the Hennepin County proposal might make some members of minority groups less likely to view American criminal justice as an alien system is among the proposal's virtues. As Andrew Deiss has observed, even Americans whose own view of the videotape evidence initially persuaded them of the guilt of the police officers who beat Rodney King probably would have seen the officers' acquittals as just (or at least as acceptable) if these verdicts had been rendered by an all-African-American jury. One measure of a jury system's success may be the extent to which it inspires the members of a diverse community to say of verdicts that depart from their predilections, "I guess I was wrong." n74

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n72 Abramson, supra note 50, at 125.

n73 Compare the too grand, too English, and too often quoted statement of Rex v. Sussex Justices, [1924] 1 K.B. 256, 259: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

n74 See Deiss, supra note 43, at 51.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Diverse viewpoints are more important to a jury's performance than diverse skin color, but promoting diversity of race and ethnicity may provide a more workable means of ensuring diverse viewpoints than attempting to probe viewpoints directly through questionnaires, voir dire examinations, and the like. The experiences of members of different racial and ethnic groups tend to differ in ways that may affect their perceptions of some issues that come before juries. n75 Not only would the direct probing of the
[*723] attitudes of prospective jurors be burdensome and invasive of their privacy, but it also would pose a risk of governmental viewpoint discrimination. This risk seems insubstantial when jury selection rests on objective demographic indicators of social experience and when no group is assured more representation than its share of the population.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n75 See, e.g., Jim Ross, Race Divides Opinions on Bunch Case, Poll Says, St. Petersburg Times, Nov. 21, 1993, at A1; Most Blacks Say Too Few Convicted in King Beating Case, Reuters, Apr. 19, 1993, available in LEXIS, News Library, Reuna File (reporting that twice as high a percentage of African-Americans as of whites consider the justice system biased). Both of these sources and others suggesting racial differences are cited in Nancy J. King, The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle, 31 Am. Crim. L. Rev. 1177, 1192-95 (1994).

The Florida Supreme Court recently ordered an evidentiary hearing in a civil case in which one member of an all-white jury reported that some of his fellow jurors had compared a black witness to a chimpanzee, used racial epithets, and joked that the plaintiffs' children probably were drug dealers. Powell v. Allstate Ins. Co., No. 83,625, 1995 Fla. LEXIS 24, at *1-*3 (No. 83,625, Jan. 19, 1995). Even when the presence of one or more minority-race jurors does not affect the quality of a jury's deliberations, it is likely to inhibit this sort of dialogue.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In short, the Hennepin County quotas would present few of the difficulties that prompt concern about other affirmative action programs and about racial classifications in general. These quotas would not deprive individuals of significant tangible benefits; they would not brand any group as inferior or evaluate any individual on the basis of racial stereotypes; and far from diverting the grand jury from its central mission, they would be likely to enhance the grand jury's achievement of its objectives.

VI. Peremptory Challenges and Racial Balance

Ironically, the Supreme Court Justices who appear most likely to disapprove the Hennepin County proposal have expressed sympathy for a more invidious procedure that they believe may contribute in some circumstances to racially balanced juries. In Georgia v. McCollum, n76 the Supreme Court held that the Constitution forbids defense attorneys as well as prosecutors from exercising peremptory challenges to exclude prospective African-American jurors on the basis of race. n77 An amicus curiae brief submitted by the NAACP in support of the McCollum ruling suggested that the use of peremptory challenges by minority defendants to exclude prospective white jurors should be treated differently. The brief declared, "The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race." n78 Justice O'Connor, dissenting in McCollum, quoted this language with approval. n79 Justice Thomas, concurring in McCollum only on the ground that precedent compelled the Court's result, declared, "I am certain that black criminal defendants will [*724] rue the day that this court ventured down the road" of using the Constitution to restrict peremptory challenges. n80

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n76 112 S. Ct. 2348 (1992).

n77 Id. at 2359.

n78 Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. at 9-10, McCollum v. Georgia, 112 S. Ct. 2348 (1992) (No. 91-372).

n79 McCollum, 112 S. Ct. at 2364 (O'Connnor, J., dissenting).

n80 Id. at 2360 (Thomas, J., concurring); see also Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting) ("Both sides have peremptory challenges, and they are sometimes used to assure rather than to prevent a racially diverse jury.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

An unrestricted regime of peremptory challenges of the sort apparently favored by Justice Thomas and other Supreme Court Justices n81 is far more likely to produce all-white juries and other forms of racial imbalance than a regime in which discrimination in the exercise of peremptory challenges is forbidden. One need not be a great mathematician to recognize that when both sides have an equal number of challenges, n82 an advocate seeking the exclusion of a minority group is more likely to achieve her objective than an advocate seeking the exclusion of the majority. n83

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n81 See J.E.B. v. T.B., 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting); Powers v. Ohio, 499 U.S. 400, 417 (1991) (Scalia, J., dissenting); Batson v. Kentucky, 476 U.S. 79, 137 (1986) (Rehnquist, J., dissenting).

n82 Only 15 of 51 American jurisdictions afford defendants more peremptory challenges than prosecutors in noncapital felony cases, and only seven provide more challenges to defendants in misdemeanor cases. Jon Van Dyke, Jury Selection Procedures 282-84 (1977).

n83 See Commonwealth v. Soares, 387 N.E.2d 499, 515-16 (Mass. 1979) (noting that unrestricted peremptory challenges produce "a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Even the asymmetrical regime of challenges favored by the NAACP, permitting defendants to challenge prospective jurors on racial grounds only when the jurors are white, would produce racial balance only by happenstance and only on the basis of a partisan attorney's stereotypical judgment about the members of a racial group. A defense attorney representing an African-American defendant who challenges white jurors on the basis of race has concluded (perhaps accurately) that minority-group jurors are more likely than whites to favor her client's position. This advocate does not seek diversity, balance, more effective group deliberation, greater public confidence in the fairness of the justice system, or any other public good. Her goal, like that of every other advocate, is victory for her client. Although this advocate might be unlikely to secure the presence of more than two or three minority-group members on a twelve-person jury, she probably would if she could. Indeed, if luck permitted her to eliminate all prospective white jurors, she probably would consider this racial banishment a victory. n84

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n84 The Supreme Court has rejected the views of Chief Justice Rehnquist and Justices Thomas, Scalia, and O'Connor and has forbidden both prosecutors and defense attorneys from exercising peremptory challenges on racial grounds. Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992); Batson, 476 U.S. at 89. Until courts or legislatures abolish the peremptory challenge, however, the ban on racial discrimination will remain reasonably easy to evade. See Alschuler, supra note 61, at 170-79. One virtue of racial quotas is that they reduce the incentive of lawyers to engage in racial discrimination whenever the elimination of a minority juror would bring the number of minority jurors below the required minimum. Discrimination in this situation would merely lead to the replacement of one minority juror by another.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*725]

The Hennepin County plan does not depend on the uncertain outcome of partisan race wars (or race games) in the courtroom, and it does not rest on any judgment about how the members of racial groups are likely to vote in particular cases. n85 Unlike the strategies of partisans, this plan is designed to promote the public objectives of more effective grand jury deliberation and enhanced public confidence in grand jury rulings. The Hennepin County proposal rests on only one group judgment--that the members of racial minorities are likely to have (or sometimes may have, or may reasonably be seen by the public as having) distinctive experiences and perspectives that can improve a grand jury's performance. If the Supreme Court Justices who have defended the racially based exercise of peremptory challenges by either defense attorneys or prosecutors were to condemn the Hennepin County proposal as discriminatory, they surely would have things topsyturvy. Peremptory challenges can convey to excluded jurors the messages that Hennepin County's quotas do not--that someone (a

lawyer or perhaps a judge n86) disfavors the jurors' racial or ethnic groups, that this person has judged the jurors not capable or trust [*726] worthy enough to serve, and that the jurors have been evaluated on the basis of crude group stereotypes.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n85 The proposal does rest on the perception that the members of racial minorities are likely to have distinctive perspectives, and of course these perspectives may lead minority group members to vote differently from whites. The proposal does not, however, rest on any prediction of the direction or magnitude of racial differences in voting patterns, let alone on any prediction of racial differences in particular cases. The general sense of racial difference that informs the proposal bears little resemblance to the crude racial judgments that are likely to inform the exercise of peremptory challenges.

n86 Peremptory challenges often are not exercised openly in the courtroom. After opposing lawyers have told a judge which prospective jurors they wish to strike, the judge simply informs these jurors that they have been excused. See Cathy E. Bennett & Robert B. Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics section 17.21 (1993); James J. Gobert & Walter E. Jordan, Jury Selection: The Law, Art, and Science of Selecting a Jury 329 (2d ed. 1990). Cf. Georgia v. McCollum, 112 S. Ct. 2348, 2356 (1992) ("Regardless of who precipitated the jurors' removal, the perception and the reality . . . will be that the court has excused jurors based on race . . . .").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Rulings on the use of peremptory challenges and other jury qualification issues sometimes give judges a sub rosa opportunity to engage in color-conscious jury selection, and their efforts to achieve racial balance may prove more costly than openly acknowledged forms of affirmative action. In the second trial of the police officers accused of beating Rodney King (the federal court trial), Judge John G. Davies refused to permit the defendants to challenge peremptorily an African-American who had failed to disclose that he lived in South Central Los Angeles, near the center of the rioting that had followed the first King verdict. The defendants' lawyers feared that this prospective juror had omitted the information deliberately in an effort to make his way onto the jury and to remedy the perceived injustice of the first King verdict. Although Judge Davies ruled that the lawyers lacked a racially neutral reason for their challenge, he might have had another reason for retaining the challenged juror. As George Fletcher noted, "No one--not the defense, not the prosecution, not the judge--dared to go to trial without fair 'community' representation on the jury." n87

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n87 George P. Fletcher, With Justice for Some: Victims' Rights in Criminal Trials 54-55 (1995). Even in a federal district with a large minority population, colorblind jury selection might have yielded an all-white jury; the jury that Judge Davies impaneled included only two African-Americans and one Latino. See supra note 16. One wonders how many Americans who profess support for a color-blind Constitution would have been unperturbed by the selection of an all-white jury in the second King trial.

Prosecutors in the case of O.J. Simpson could have set the case for trial in the area of Los Angeles County where the murders of Nicole Brown Simpson and Ron Goldman occurred, but these prosecutors evidently preferred a trial in downtown Los Angeles, where the likelihood that the jury would include African-Americans was greater. Randall Sullivan, Unreasonable Doubt (pt. 2), Rolling Stone, Dec. 29, 1994, at 130, 149. Public opinion polls indicated that African-Americans were much less likely than whites to favor the prosecutors' position, id. at 144, but apparently no one (not the elected Los Angeles County District Attorney, in any event) wished to run the risk of an overwhelmingly white jury in a racially sensitive case. On July 19, 1994, the Los Angeles County District Attorney met with 15 African-American leaders who expressed concern that Simpson would not receive a fair trial and who urged the district attorney not to seek the death penalty. Id. at 143.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A more striking illustration of the dangers of sub rosa affirmative action came in the case of Timothy L. Baugh, an AfricanAmerican charged with fourteen rapes in Hennepin County. After one of the two African-Americans on the panel of prospective
[*727] jurors revealed that she knew three of the defendant's prospective alibi witnesses, Judge Robert Lynn permitted prosecutors to challenge this juror peremptorily. n88

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n88 State v. Baugh, SIP No. 93027320, CA No. 93-1304, Partial Transcript (Motions) at 26-27 (Hennepin County, Minn., Dist. Ct. Sept. 28, 1994).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

The one African-American still on the panel sometimes answered questions in ways that were difficult to follow. When, for example, this juror was asked why he had checked both yes and no to the question, "Under our system of justice a defendant is innocent until proven guilty beyond a reasonable doubt. Do you agree with that principle?," he replied in part, "You can't really go on facts that much because that's one of the reasons I got stabbed because she was being--okay, that facts was I done it, but I didn't do nothing and come to find out I didn't do nothing. The facts not always right." n89 Asked once more to explain, the juror said, "Let's see, okay, like I did a couple crimes, but then, okay, I did some of them and--I did most of them, I did do some of them and I didn't do some and half of the times, you know, the facts are there, but it's not there." n90

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n89 State v. Baugh, SIP No. 93027320, CA No. 93-1304, Partial Transcript (Juror Greg Davis) at 7 (Hennepin County, Minn., Dist. Ct. Sept. 28, 1994).

n90 Id. at 41.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

Other statements were more clear, however. For example, when the juror was asked, "What do you think of the criminal justice system?," he replied, "It

sucks." n91 And when a prosecutor asked how severely one of the juror's friends had been injured during an assault, he said,

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n91 Id. at 34.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

A Not too bad, she just, you know, just basically sex though.

Q It was sex?

A Yeah.

Q So this was kind of a rape situation sort of?

A Yeah. n92

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n92 Id. at 60.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Judge Lynn refused to dismiss the prospective juror for cause and also refused to allow a peremptory challenge by the prosecutor. Perhaps the judge doubted that Minneapolis prosecutors would have challenged a white juror who voiced the same views of rape and of the criminal justice system as this African-American juror.
[*728] More probably, however, the judge accepted an extralegal argument against exclusion advanced by the defense attorney. Although the Constitution prohibited this lawyer from taking race into account in exercising his own peremptory challenges, n93 he apparently saw no need to preserve the pretense of color-blindness while arguing about his opponent's challenges: "This is our last chance. We don't have any more opportunities to have a black person on this jury. . . . I ask this Court to let this juror stand." n94

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n93 Georgia v. McCollum, 112 S. Ct. 2348 (1992), may not have condemned unambiguously the racially based challenge of white prospective jurors, but the Supreme Court's subsequent ruling that the gender-based challenge of either a woman or a man is unconstitutional leaves little room for distinguishing one racially grounded challenge from another. See J.E.B. v. T.B., 114 S. Ct. 1419, 1422 (1994).

n94 State v. Baugh, SIP No. 93027320, CA No. 93-1304, Partial Transcript (Juror Greg Davis) at 69 (Hennepin County, Minn., Dist. Ct. Sept. 28, 1994).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Following selection of the challenged juror, a Minneapolis television station broadcast his mug shot. (Seven months earlier, the juror had been arrested for aggravated robbery. He had, however, been released without the filing of a formal charge.) The juror then told the court, "I cannot go on the jury." n95 Six other jurors reported that they had learned about the broadcast, all of them by disregarding the judge's instructions not to watch television. Judge Lynn then dismissed the jury and began jury selection anew. n96

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n95 Mike Sweeney, Pretrial Publicity Spurs Dismissal of Baugh Jury, St. Paul Pioneer Press, Oct. 4, 1994, at 1A. Among the many people who had approached the juror following the news broadcast was a stranger who said, "I know you're going to hang him, right?" Id.

n96 See Doug Grow, Judge's Reasoning in Baugh Case Isn't New: Blame Media, Minneapolis Star Trib., Oct. 4, 1994, at B3; Sweeney, supra note 95, at 1A; Margaret Zack, Judge Dismisses Whole Jury for Rape Trial, Minneapolis Star Trib., Oct. 4, 1994, at A1.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A racial quota would have permitted Judge Lynn to evaluate the prosecutor's challenge on its merits without concern that permitting the challenge would have yielded an all-white jury. Such a quota could have assured the judge that dismissal of the challenged juror would have led only to the replacement of this minority juror with another.

VII. Quotas and Federalism

Recent Supreme Court decisions have indicated that the constitutionality of affirmative action programs depends in large mea [*729] sure on whether they were approved by Congress or by state or local legislative bodies. In Metro Broadcasting, Inc. v. FCC, n97 the Supreme Court considered federal legislation and said that encouraging diverse radio and television programming was an appropriate governmental objective. n98 The Court held, moreover, that promoting the minority ownership of radio and television stations was an appropriate means of furthering this legitimate goal of diversity. n99 The case for employing color-conscious measures to promote the expression of diverse perspectives in the jury room seems at least as compelling as the case for employing color-conscious measures in the allocation of broadcast licenses. Promoting the sound administration of justice seems fully as important as promoting a choice of music and talk shows. Metro Broadcasting, however, is not on point in evaluating the constitutionality of the Hennepin County proposal for one reason: in judging affirmative action efforts, the Supreme Court has turned ordinary concepts of federalism on their head. n100

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n97 497 U.S. 547 (1990).

n98 Id. at 567.

n99 Id. at 567-68; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment)

("Although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

n100 In addition, the Supreme Court maintained that Metro Broadcasting concerned the constitutionality of a racial "preference" rather than a racial quota. Metro Broadcasting, 497 U.S. at 599. Among the policies that the Court upheld in Metro Broadcasting, however, was one that limited all "distress sales" of broadcast facilities to minority-controlled enterprises--a requirement that might have been characterized as a 100% quota. Id. at 598-99.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In Justice Brandeis's classic language, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." n101 Nevertheless, the Supreme Court has afforded the federal government more freedom to experiment in the creation of affirmative action programs than local governments, subjecting only the efforts of local governments to "strict scrutiny."

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n101 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In Richmond v. J.A. Croson Co., n102 the Court attempted to justify this approach by emphasizing Congress's power under Sec- [*730] tion V of the Fourteenth Amendment to enforce that Amendment. n103 How an affirmative action program that would violate the Fourteenth Amendment when approved by a state legislature could become an appropriate means of enforcing the Amendment when approved by Congress was, however, a mystery. n104 Later, in Metro Broadcasting, the Court exempted the federal government's race-conscious allocation of broadcast licenses from strict scrutiny despite the fact that Congress's powers under Section V of the Fourteenth Amendment plainly had no bearing on the issue. n105 Talk of federalism in Croson and Metro Broadcasting may have been designed primarily to alibi the Supreme Court's vacillation on affirmative action issues. n106

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n102 488 U.S. 469 (1989).

n103 Id. at 486-96.

n104 See id. at 518 (Kennedy, J., concurring in part and concurring in the judgment).

n105 Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990); see also Croson, 488 U.S. at 522-24 (Scalia, J., concurring in the judgment) (offering a Madisonian justification for inverting the view of federalism expressed by James Madison in The Federalist No. 45, at 313 (Jacob E. Cooke ed., 1961)).

n106 See Albert W. Alschuler, Failed Pragmatism: Reflections on the Burger Court, 100 Harv. L. Rev. 1436, 1437 (1987) (suggesting that such wavering has been characteristic of the Court's approach to many constitutional issues of our time).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In 1947, an opinion for the Court by Justice Jackson took a different view from the one expressed in recent cases:

We . . . will not use [the Fourteenth] Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality. . . . The states have had different and constantly changing tests of eligibility for service. Evolution of the jury continues even now, and many experiments are under way that were strange to the common law. . . . Well has it been said of our power to limit state action that "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." n107

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n107 Fay v. New York, 332 U.S. 261, 295-96 (1947) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (citations omitted).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

At a time when the jury and other democratic institutions may be faltering and when racial mistrust runs high, Justice Jackson's warning of the danger of restricting the remedial efforts of local governments seems especially apropos. [*731]

VIII. Some Questions and Problems n108

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n108 When I presented an early version of this paper to the Center for the New American Community of the Manhattan Institute, questions focused on a hypothetical African-American tourist from Massachusetts arrested and charged with a crime in Montana, a state with no significant African-American population. Could an all-white Montana jury give this defendant a fair trial? If so, couldn't an all-white jury in Massachusetts afford the defendant a fair trial as well? Would the inclusion of Native Americans from Montana on this African-American defendant's jury assure him a fair trial? If AfricanAmericans truly have distinct perspectives that ought to be heard, shouldn't Montana bus in African-American jurors from somewhere else? This Part considers the constitutional issues suggested by these questions and a few other issues as well.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A. Racial Matching

Shari Lynn Johnson has proposed that every African-American, Native American, or Hispanic-American defendant be entitled to the inclusion of three "racially similar" jurors on a jury of twelve. n109 The Hennepin County proposal, however, does not attempt to match the races of jurors and defendants, and contrary to common assumptions, its principal objective is not to assure every minority defendant a jury of his "peers." n110

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n109 Shari L. Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1698-99 (1985). Compare Colbert, supra note 51, at 124 ("A race neutral verdict is achieved when at least three black jurors are selected to judge a criminal or civil case that involves the rights of a black person.").

n110 See infra note 132.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The presence of minority-race jurors may be especially important when minority-race defendants are on trial, but the value of inclusive jury selection procedures is not limited to the cases of these defendants. The discussion of verdicts by all-white juries with which this Article began mentioned only one prosecution in which the defendants were members of a racial minority, that of the Scottsboro boys. Most of these troublesome verdicts came in cases in which the defendants were white. In recent years, cases in which white law enforcement officers have been accused of mistreating minority suspects have been a special source of concern. White jurors may tend to view the victimization of nonwhites as less serious than the victimization of members of their own racial group. This danger seems fully as strong as the danger that white jurors will be biased against minority defendants. n111 Indeed, ver- [*732] dicts by all-white juries sometimes have been problematic even when both the defendant and his asserted victim were white; consider cases in which white jurors tolerated violence against white Republicans following the Civil War and against white civil rights workers a century later.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n111 See David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 185 (1990) (revealing that the killers of white victims are more likely to be sentenced to death than the killers of nonwhite victims and that the race of the victim affects the likelihood of capital punishment more than the race of the defendant); William C. Heffernan, The Majoritarian Threat Posed by the Jury, 25 Crim. L. Bull. 79, 80-82 (1989) (emphasizing that the tyranny of the majority can infect jury trials just as it does other democratic institutions and that the risk of this tyranny is as great for unpopular victims and those who identify with them as it is for criminal defendants).

Jeffrey Abramson has summarized some findings of the University of Chicago Jury Project of the 1950s:

In regard to black defendants, the study suggested two conclusions about jury verdicts. First, all-white juries had trouble taking seriously violence within the black community, especially within the black family. They treated black defendants in such cases as parents treat children, dismissing their crimes as "what one expects from a Negro." Second, all-white juries reacted with severity to black defendants charged with violence against whites, convicting them in disproportionate numbers.

Abramson, supra note 50, at 110 (discussing Dale W. Broeder, The Negro in Court, 1965 Duke L.J. 19) (footnotes omitted).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Moreover, the inclusion of minority jurors can make juries fairer and more effective in cases that do not present racially sensitive issues. Justice Marshall wrote for the Supreme Court in Peters v. Kiff:

We are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case n112

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n112 407 U.S. 493, 503-04 (1972); cf. Ballard v. United States, 329 U.S. 187, 193-94 (1946) ("The truth is that [men and women] are not fungible; a community made up exclusively of one is different from a community composed of both. . . . A flavor, a distinct quality is lost if either sex is excluded.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Affirmative action in jury selection has value in cases other than those with minority defendants. Moreover, efforts to match jurors and defendants by race and ethnicity could prove difficult and unbecoming. These efforts would require courts to confront such questions as whether Mexican-Americans are sufficiently similar in background and culture to Puerto Ricans to merit affir- [*733] mative inclusion on the juries of Puerto Rican defendants, whether Filipino-Americans are sufficiently similar in race and ethnicity to warrant their affirmative inclusion on the juries of Japanese-American defendants, and whether any prospective jurors are racially or ethnically similar to a defendant whose grandparents are AfricanAmerican, Hispanic-American, Asian-American, and Native American. n113 As the United States grows more multiracial and multicultural, n114 troublesome issues of racial matching could arise more frequently.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n113 See Alschuler, supra note 61, at 191-92.

n114 The number of children living in families in which one parent is white and the other is African-American, Asian-American, or Native American has tripled since 1970. See Deborah A. Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 Stan. L. Rev. (forthcoming 1995) (citing Bureau of the Census, 1990 Data on Interracial Households (1994)); see also Julie C. Lythcott-Haims, Note, Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption, 29 Harv. C.R.-C.L. L. Rev. 531 (1994).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. Racial Grouping

Affirmative action in jury selection does not require the racial matching of jurors and defendants. It does, however, require specification of the appropriate group for distinctive treatment. In seeking an end to all-white grand juries, the Hennepin County proposal treats "minority persons" as the relevant group. n115 This choice might appear problematic in some situations--for example, one in which two Asian-Americans but no African-Americans have been selected to serve on a grand jury considering the alleged abuse of African-Americans by the police.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n115 Hennepin County Final Report, supra note 19, at 27.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Few members of racial and ethnic minorities consider themselves part of an undifferentiated "minority group." n116 The first Rodney King jury included two "minority persons" (a Latino and an Asian-American), n117 but the inclusion of these jurors did not forestall the rioting, anger, and recrimination that followed the jury's verdict. Indeed, the inclusion of these minority jurors did not prevent some journalists from describing the jury as allwhite. n118

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n116 See Johnson, supra note 109, at 1698 (citing empirical data "which show[ ] that minority group members replicate the majority's view of all racial minorities except their own").

n117 See Jacqueline Soteropoulos, With Juries, Appearances Matter; Experts Say Minority Representation Low, Tampa Trib., Dec. 5, 1994, Florida Metro Section, at 1.

n118 See, e.g., All-White Jury to Hear Trial of Police in Beating Case, Orlando Sentinel Trib., Mar. 3, 1992, at A15; Herb Caen, Monday Short Line, S.F. Chron., May 4, 1992, at B1; Lou Cannon, L.A. Police Dept.: 'Dragnet' It Isn't, Wash. Post, Mar. 29, 1992, at A3; Jorge Casuso, Video of L.A. Beating Shown As Trial Begins, Chi. Trib., Mar. 6, 1992, at A4; Michael Prowse, Wounds Run

Deep: America's Racial Tensions Are at Snapping Point, Fin. Times, May 2, 1992, at 9.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*734]

The appropriateness of grouping minority persons together may depend partly on the extent to which the members of racial and ethnic minorities sense commonalities with one another and on the extent to which other audiences perceive these commonalities as well. Appropriate grouping may depend more fundamentally, however, on the demographics of particular jurisdictions.

Suppose, for example, that the expected number of AfricanAmericans on a randomly selected jury in Lake Wobegon County, rounded to the nearest whole number, is none. Suppose that the expected number of Hispanic-Americans also is none, that the expected number of Native Americans is none, and that the expected number of Asian-Americans is none. Suppose, however, that if the members of these four racial and ethnic groups were joined together, the expected number of "minority persons" on each jury would be one or, with only slight upward rounding, two. Providing for the inclusion of one or two "minority persons" on every jury in Lake Wobegon County would ensure some minority representation in every case while, in effect, using random methods to determine which groups would be represented in particular cases. Specification of the appropriate group for distinctive treatment may vary with the racial and ethnic characteristics and the social experiences of particular jurisdictions, and officials who understand local conditions seem best suited to draw the necessary lines.

C. Nonracial Groups

In 1979, Douglas R. Schmidt, an attorney for Dan White, succeeded in keeping homosexual men and women off the jury that tried White for murdering George Moscone, the mayor of San Francisco, and Harvey Milk, a San Francisco supervisor and prominent gay activist. n119 The jury accepted White's partial defense of diminished capacity (often called "the Twinkie defense" because a defense expert testified that junk food was one of the influences
[*735] that had deprived White of the capacity to act with malice). The Dan White verdict brought to the streets 5,000 gay men who marched on city hall, smashed windows, and overturned and burned eight police cars. n120

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n119 See Fletcher, supra note 87, at 34 ("Since the candidates for the jury had to declare their marital status, it was not too difficult to ferret out probable gays . . . .").

n120 Id. at 1, 15, 260.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In 1991, William Kunstler sought a "third world jury of nonwhites, or anyone who's been pushed down by white society," n121 to try El-Sayyid Nosair for killing Meir Kahane, the founder of the Jewish Defense League and an Israeli ultranationalist. The jury that acquitted Nosair of killing Kahane included no Jews, n122 and the judge who presided at the trial declared that its verdict

was "against the overwhelming evidence and . . . devoid of common sense and logic." n123 Jews in both New York and Israel took to the streets to protest this verdict. n124

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n121 Abramson, supra note 50, at 145.

n122 See Fletcher, supra note 87, at 75-79.

n123 Id. at 85.

n124 Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

One year later (during the same year as the first Rodney King verdict), a Brooklyn jury with no Jewish members n125 acquitted Lemrick Nelson, Jr. of killing Yankel Rosenbaum during a violent encounter between African-Americans and Jews. n126 Rosenbaum had identified Nelson, an African-American teenager, as his attacker, and the murder weapon had been found in Nelson's possession. Thousands of Hasidic Jews gathered in protest. n127

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n125 Jews constitute 16% of the Brooklyn population and about 20% of the population eligible for jury service. Id. at 92.

n126 Id. at 103.

n127 See Abramson, supra note 50, at 103; Fletcher, supra note 87, at 90, 103.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As these cases reveal, the members of nonracial groups may feel aggrieved when no members of their groups sit on the juries that resolve cases drawing their strong interest and concern. Nevertheless, in a reasonably small body like a jury, ensuring proportional representation by race, gender, sexual orientation, handicap, religion, nationality, wealth, and age would be impossible. The Hennepin County Attorney, Michael O. Freeman (who appointed the Hennepin County Task Force and who strongly supports its proposals), reports that he personally would draw the line at race and accept any political consequences that follow.

This line seems appropriate. No other group in America can recite a history of mistreatment by juries comparable to the mis- [*736] treatment of African-Americans that the opening section of this Article chronicled in part. One hundred fifteen years ago, in Strauder v. West Virginia, n128 the Supreme Court recognized the distinctiveness of this mistreatment. Noting the prejudice with which whites regarded African-Americans, n129 the Court held that the exclusion of African-Americans from jury service violated the right of African-American litigants to equal protection of the laws. At the same time, the Supreme Court declared that the exclusion of members of nonracial groups from jury service (women, for example) did not violate the equal protection

rights of litigants who belonged to these groups. n130 The Court considered racial discrimination sui generis. n131 In places other than Hennepin County, different histories, different demographics, and different social issues might prompt the affirmative inclusion of members of some nonracial groups on juries. Once more, the difficult task of grouping and line-drawing seems best left to state and local governments.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n128 100 U.S. 303 (1880).

n129 Id. at 309-10.

n130 Id. at 310 ("[A state] may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this."); see Minor v. Happersett, 88 U.S. 162 (1874) (holding unanimously that the Fourteenth Amendment did not extend the vote to women).

n131 Although the Supreme Court has not required any sort of proportional representation on juries as a matter of constitutional law, it has said that the case for the proportional representation of African-Americans is stronger than the case for the proportional representation of groups defined only by their economic circumstances. See Fay v. New York, 332 U.S. 261, 291 (1947).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

D. Representation or Diversity

The Hennepin County proposal might enhance the sense of minority-group members and others that minorities are represented in jury proceedings. It also might promote the expression of diverse viewpoints in the jury room and enhance the quality of jury deliberations. Although the proposal furthers both objectives and forces no choice between them, the two goals are not identical. n132

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n132 A third objective of the Hennepin County proposal might be more fully assuring minority defendants that they will be tried by "juries of their peers" through the inclusion of racially and ethnically similar jurors. This objective might conflict with either of the others, but promoting greater identity between defendants and jurors at the cost of representation of the community is not likely. Few, for example, would deliberately include either a disproportionate share of high school dropouts on the juries that try high school dropouts or a disproportionate share of Ph.D.'s on the juries that try Ph.D.'s. When the goal of including jurors whom defendants are likely to recognize as their peers conflicts with the goal of representing the community, community representation is likely to prevail. Again, however, the Hennepin County proposal does not carry any of the possible justifications for affirmative action in jury selection to the point that it conflicts with any of the others.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*737]

The claim that jurors serve in a representative capacity seems in one sense uncontroversial. When community moral judgments are too varied and complex to be translated into precise rules, legislatures may delegate to juries the task of ensuring that criminal judgments accord with the community's sense of justice. The Supreme Court has said for more than fifty years, "The proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community.' " n133 The Court's most recent opinion on jury selection reiterated this theme: "The diverse and representative character of the jury must be maintained . . . ." n134 Although American juries now lack the formal power to resolve questions of law that many American juries once possessed, n135 vague standards of substantive criminal law (for example, in cases presenting questions of homicide, fraud, obscenity, causation, self-defense, and necessity) invite and require the exercise of a de facto lawmaking power. The exercise of this power seems appropriate only if juries in some sense represent their communities. Moreover, juries authorized to determine the length of prison sentences (in a few states) and to decide whether to impose the death penalty (in many) plainly have been afforded their awesome powers on the assumption that they represent their communities.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n133 Glasser v. United States, 315 U.S. 60, 86 (1942) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)); see Ballew v. Georgia, 435 U.S. 223, 237 (1978); Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970).

n134 J.E.B. v. T.B., 114 S. Ct. 1419, 1424 (1994). But see Holland v. Illinois, 493 U.S. 474, 480 (1990) (declaring that the Sixth Amendment guarantees an impartial jury, not a representative one).

n135 See Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 902-21 (1994).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In another sense, however, the claim that jurors serve in a representative capacity seems troublesome: no individual juror should be expected to represent anyone other than herself. If Hennepin County's jury selection methods encouraged minorityrace jurors to view themselves not simply as independent citizens, but as representatives of a race or a people, that effect would be [*738] regrettable. n136 The proposition that jurors both represent others and act independently may seem contradictory, but perhaps the contradiction can be resolved if juries but not jurors act as community representatives. The selection of a sufficiently large body of jurors through sufficiently inclusive means may permit every juror to vote her conscience while still providing some assurance that the jury's collective judgment accords with general community sentiments. n137 The Hennepin County proposal reflects the same ambivalence concerning representation that characterizes most [*739] views of the jury; it is not intended to compromise or restrict the independence of jurors.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n136 Jeffrey Abramson, an opponent of the use of racial quotas in jury selection, has written that the issue turns primarily on whether one views juries as "deliberative" or "representative." See Abramson, supra note 50, at 8. Abramson has said, "The ideal of the cross-sectional jury rejects the common-law view of impartial deliberation. It sees individual jurors as inevitably the bearers of the diverse perspectives and interests of their race, religion, gender, and ethnic background." Id. at 100-01. In Abramson's view, "The new purpose of the cross-section becomes to give voice or representation to competing group loyalties, almost as if a juror had been sent by constituents to vote their preferred verdict." Id. at 102. He observes, "Surely the jury has not survived all these centuries only to teach us that democracy is about brokering justice among irreconcilably antagonistic groups." Id. at 8; see also id. at 245-47.

The vision that informs the Hennepin County proposal, however, is not one of selfish interest-group politics. Such a vision, extended to the jury room, might yield only hung juries and compromise verdicts. Instead, the vision of politics that the Hennepin County Task Force hoped to implement more fully in the jury room is one that has been described by Robert Hughes:

The social richness of America, so striking to the foreigner, comes from the diversity of its tribes. Its capacity for cohesion, for some spirit of common agreement on what is to be done, comes from the willingness of those tribes not to elevate their cultural differences into impassable barriers and ramparts, not to fetishize their "African-ness" or Italianita, which make them distinct, at the expense of their Americanness, which gives them a vast common ground.

Robert Hughes, Culture of Complaint: The Fraying of America 20 (1993). As Abramson notes, "Jurors cross demographic boundaries to reach unanimous verdicts in cases every day." Abramson, supra note 50, at 104. Abramson's two models of the jury do not seem incompatible; juries can be both deliberative and representative. Indeed, the principal reason for making juries more representative is to improve the quality of their deliberations. But see infra text accompanying note 141 (arguing that affirmative action measures must be bounded by concepts of proportional representation even when they are designed primarily to improve the quality of jury deliberations).

n137 James Madison suggested that elected officials should seek to advance the welfare of the community rather than to promote the views of their own constituents. See The Federalist No. 10, at 60-61 (Jacob E. Cooke ed., 1961). This position echoed that of Edmund Burke, who maintained that legislators should regard themselves as trustees rather than as delegates--that is, as people trusted by the electorate to exercise independent judgment rather than as people chosen to implement the electorate's own legislative goals. See Edmund Burke, Burke's Politics 28 (Ross Hoffman & Paul Levack eds., 1949); Hannah Pitkin, The Concept of Representation 171-72 (1967). Jurors certainly should sense no greater obligation to act as representatives than legislators and other elected officials do. They probably should sense substantially less.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Adding diverse perspectives to the jury room could in some circumstances conflict with the goal of promoting effective representation of the community.

If, for example, a rural county with a tiny minority population were to include one or two minoritygroup members on every jury (perhaps even importing some of these jurors from an urban neighborhood outside the county), this measure might enhance the expression of distinctive viewpoints while making juries less representative of the county's population. n138

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n138 The likelihood that any political agency would in fact vote to make juries less representative in order to enhance diversity seems exceedingly small.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The extent to which governments can legitimately sacrifice representation to enhance the quality of jury deliberations is unclear. n139 For example, in an effort to improve the performance of juries, a state might mandate the affirmative inclusion of some jurors on nonracial bases. This state might require that every jury include one college graduate, that every jury impaneled to hear a tax prosecution include two accountants, that half of the jurors hearing a medical malpractice case be members of the medical profession, that a jury hearing a mercantile dispute be composed mostly of merchants, and that every jury include a licensed member of the bar. Some of this state's mandatory inclusions might be constitutional, while others might seem inconsistent with a concept of jury trial that state and federal constitutions should preserve. n140

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n139 Compare cases cited supra note 68 with Thiel v. Southern Pac. Co., 328 U.S. 217, 223-25 (1946) (using the Supreme Court's supervisory power to strike down an exclusion of daily wage earners from jury service and declaring that the Court would not "breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged").

n140 Common law courts sometimes impaneled juries of experts, which "ranged from panels of cooks and fishmongers to the all-female jury panel impaneled to ascertain whether a female defendant was pregnant." Oldham, supra note 48, at 139; see also 1 James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 93-99 (1992) (describing Lord Chief Justice Mansfield's use of merchant juries in commercial cases). Even apart from the use of "special" juries, property qualifications and other devices were intended to make common law juries more "qualified" than "representative." See Oldham, supra note 48, at 140-64. But see Thiel, 328 U.S. at 223-24 (declaring that democratic nature of jury system makes wealth irrelevant to qualification for jury service).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*740]

One danger posed by the nonrandom inclusion on juries of people with special qualifications is that of ideological jury-stacking. This danger seems most pronounced when the likelihood of distinctive viewpoints is itself considered a qualification for service and when officials may guarantee some favored groups greaterthan-proportional representation. The Constitution probably should